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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

STEVEN MACARTHUR, ET AL., PETITIONER

v.

SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a case of first impression. This is a case to ***protect human life***, to protect these whistle blowing petitioners trying ***to protect human life***, and to protect the Navajo Court processes so it can protect human life.

> Do Article III Courts have any subject matter jurisdiction to do anything other than give full force and effect to Navajo Nation Court civil law judgments, decrees, and orders of all types, including these orders?

RULE 29.6

DONNA SINGER, Fred Riggs, and
Al Dickson,
Petitioners/Plaintiffs

v.

SAN JUAN COUNTY (A Utah County) , SAN JUAN HEALTH
SERVICES DISTRICT (a Utah Independent Political Subdivision), ex- County Commissioner J. Tyron, Lewis, ex- County Commissioner Bill Redd, ex-County Commissioner Mark Maryboy (official capacity only), County Commissioner Bruce Adams (official capacity only), County Commissioner Kenneth Maryboy (official capacity only), County Commissioner Lynne Stevens (official capacity only), San Juan County Attorney Craig Halls, Reid Wood, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway (official capacity only), County Administrator/ex San Juan Health Services District CEO Richard Bailey, Mr. R. Dennis Ickes, Esq, Truck Insurance, and other John and Jane Does as yet to be identified, officially and individually, jointly and severably,
Respondents/Defendants

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, by and through undersigned counsel, hereby respectfully petitions this Court for a Writ of Certiorari to hear their appeal of the Tenth Circuit Court's opinion in this case.

OPINIONS BELOW

Tenth Circuit Court vacating prior District Court decision and remanding the case, MacArthur et al v. San Juan County et al, 309 F.3d 1216; 2002 U.S. App. LEXIS 20987 (2002) US Supreme Court certiorari denied by Riggs v. San Juan County, 539 U.S. 902, 123 S. Ct. 2246, 156 L. Ed. 2d 110, 2003 U.S. LEXIS 4286 (2003) US Supreme Court certiorari denied by San Juan County v. Riggs, 539 U.S. 902, 123 S. Ct. 2252, 156 L. Ed. 2d 110, 2003 U.S. LEXIS 4287 (2003) US Supreme Court certiorari denied by San Juan Health Servs. v. Riggs, 539 U.S. 902, 123 S. Ct. 2252, 156 L. Ed. 2d 110, 2003 U.S. LEXIS 4288 (2003) Dismissal motions ruled upon MacArthur v. San Juan County, 416 F. Supp. 2d 1098, 2005 U.S. Dist. LEXIS 25235 (D. Utah, 2005) ("MacArthur")

Tenth Circuit Court affirms district court refusal to enforce Navajo Court orders, vacates those portions of the U.S. District Court decision affirming jurisdiction of the Navajo Court.

MacArthur et al v. San Juan County et al, 497 F.3d 1057; 2007 U.S. App. LEXIS 17008 (2007).

JURISDICTION

On July 18, 2007 the Tenth Circuit entered its judgment. (Appendix pg. 1a et seq.) On August 14,

2007 the Court denied the Petitioners motions for reconsideration and en banc review. (Appendix pg. 582a- 583a) . This Court's jurisdiction to hear appeals is invoked under 28 U. S. C. §§ 1254 (1), 2101(e). The authority of a Federal District Court to grant the Petitioners' relief is found in 28 U.S.C. §§1331, 1343, Article III, . Petitioners challenge this Court's Article III jurisdictional authority to review, diminish, or vacate Tribal Court authority and de novo review of Navajo Court judgments
as outside 28 U.S.C. §1331.

RELEVANT PROVISIONS INVOLVED

U.S. Constitution Art. 1

"Section 1.
All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. ....
Section 8.
The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
To borrow Money on the credit of the United States;
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes..."

ARTICLE II

"Section 1.
The executive Power shall be vested in a President of the United States of America.....
Section 2.
....He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;
Section 3
....he shall take Care that the Laws be faithfully executed...."

ARTICLE III
"Section 1.
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
Section 2.
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority
....In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

ARTICLE IV
Section 3.
"..The Congress shall have Power to dispose of and make all needful Rules and Regulations

respecting the Territory or other Property belonging to the United States..."

ARTICLE VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. "

Federal Statutes

25 U.S.C. § 1301. "*Definitions*

For purposes of this subchapter, the term –

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;..."

25 U.S.C. § 1302." *Constitutional rights*

No Indian tribe in exercising powers of self-government shall -....

(8)deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law; ..."

25 U.S.C.§ 3601." *Findings*

The Congress finds and declares that—
(1) there is a government-to-government relationship between the United States and each Indian tribe;
(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;
(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;
(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;
(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments; ..."
(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;..."

25 U.S.C. 3651 "Findings
The Congress finds and declares that— ....
(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands;..."

1. Navajo Nation Code:

7 NNC §253 Jurisdiction -generally

" (A) The District Courts of the Navajo Nation shall have original jurisdiction over: ...

2. Civil Causes of Action. All civil actions in which the Defendant (1) is a resident of Navajo Indian Country; or, (2) causes an action or injury to occur within the territorial jurisdiction of the Navajo Nation.

3. Miscellaneous. All other matters provided by Navajo Nation statutory law, Dine` be beenahaz`aani, and Navajo Nation Treaties with the United States of America or other governments. All causes of action recognized in law, including general principals of American law, applicable to Courts of general jurisdiction."

7 NNC §254 Territorial jurisdiction

"A. The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all lands within the limits of dependent Navajo Indian Communities, all Navajo Indian Allotments, all land owned in fee by the Navajo Nation, all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or band of Navajo Indians. "

7 NNC §303 Writs or Orders

"The Supreme Court [Navajo] shall have power to issue any writs or orders:

....

B. To prevent or remedy an act of any Court which is beyond such Court's jurisdiction...."

Chapter160
March 1, 1933. | [H.R. 11735.] 47 Stat., 1418.

An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes.

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: [property description]... and the same are hereby, permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided,* That no further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: *Provided,* That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section

1 hereof, or for the benefit of the Indians residing therein.

SEC. 2.

That the State of Utah may relinquish such *tracts of school land* within the areas added to the Navajo Reservation by section 1 of this Act as it may see fit in favor of the said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

Approved, March 1, 1933.

3. Utah Constitutional and Statutory Provisions

Utah Constitution

Article 3 [Right to public domain disclaimed -- Taxation of lands -- Exemption.]

Second: -- The people inhabiting this State do affirm and declare that they *forever* disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the

absolute jurisdiction and control of the Congress of the United States.

STATEMENT

This is a case of first impression. Contrary to the Tenth Circuit's re-characterization of this case as a employment case, ignoring nearly completely the dangers to the Patients (Appendix pg. 8a), effect on the Aneth and Red Mesa chapters of their employment conduct (Appendix pg. 60-61, 564-571), these Navajo Court orders were to ***protect human life*** [1], to protect these whistle blowing petitioners trying ***to protect human life*** [2], and to protect the Court processes [3], so it could ***protect human life,*** from the Respondents actions found to be driving Navajo patients from their

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[1] (Appendix pgs. 454a (Navajo patients ...are being harmed, 455a, 467a ("endangerment of the Native American and Navajo public...") 468a, 469a (250% drop in diabetic visits), 473a, 475a (diabetics not seen for 3 months or longer), 476a (patients with life threatening disease went without care due to Court misconduct in the presence of the Court, the Court relied upon), 482a (court remedy for the patients), 496a (grossly harmed petitioners and patients), 497a, 498a, 501a)

[2] (Appendix pgs. 455a ("For raising such claims, the plaintiffs, as well as plaintiffs counsels, were labeled 'bold faced liars' by the defendants and likewise, San Juan Health Services District has totally disregarded the Navajo Nation's chapters' resolutions and the concerns for the Navajo patients' well being."), 462a (using the false fraud administrative and Navajo Court claims to retaliate against Mrs. Singer), 469a, 457a (Mr. Riggs informed the defendants of their discrimination and had a promotion offer withdrawn, and was further disciplined without a basis), 459a, 472a(Mr. Riggs uncle died in WWII for U.S. and Navajo interests), and 474a (all three subjected to a trial by tabloid), 462a-463a)

3 (Appendix pgs. 455a, 471a, 476a)

Treaty-guaranteed, federally-mandated free health care, and retaliating against the whistleblowing petitioners. Under *Montana v. United States*, infra, Indian tribunals are divested of authority, not by Congress or the Executive branches, but by 'implication' and judicially made law with certain exceptions. [4]

The Tenth Circuit refused enforcement using Montana v. United States 450 U.S. 544, 565-566 (1981) and its progeny [5], and cloaking these municipal type Respondents (Indian and non Indian alike) with *state* immunity. See, Justice Thomas' decision for the majority in Northern Insurance Company of New York v. Chatham County, Georgia, 547 U.S. ___ (2006), Decided April 25, 2006, No. 04-1618. Jinks v. Richland County, 538 U. S. 456, 466 (2003).

As Justice Thomas observed in his concurrence in U.S. v. Lara, 541 U.S. 193 (2004), "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases. " In Hicks, at 376, Justice Souter wrote, "

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[4]

> "..[T]he activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." ..."[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." "necessary to protect tribal self-government or to control internal relations."

Montana, pg. 565-566.

[5] Atkinson Trading Post v. Shirley, 532 U.S. 645, 653 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); and Nevada v. Hicks, 533 U.S. 353 (2001)

"Petitioners are certainly correct that '[t]ribal adjudicatory jurisdiction over nonmembers is "ill-defined,'since this Court's own pronouncements on the issue have pointed in seemingly opposite directions." [citations omitted].

This decision is in conflict with new Tenth Circuit law issued September 17, 2007 by a different panel. The lower courts here use Montana to do something Respondents could not do directly, i.e. obtain a Federal Court declaratory judgment against the Navajo Nation for its Court's exceeding authority. 28 U.S.C. 1331, is not a waiver of Indian Nation sovereign immunity to suit. *See*, Minor Electric Inc. v. Muscogee (Creek) Nation, 2007 U.S. App. LEXIS 22432,* relying on Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978), rejecting the Montana analysis depended upon by the District Court below to deny dismissal of the action against the Nation. *See also*, Auto –owners Insurance Company v. the Tribal Court of the Spirit Lake Indian Reservation, et al, 2007 U.S. App. LEXIS 18239,*;495 F.3d 1017. Eighth Circuit May 17, 2007.

Here, Petitioners seeking enforcement of these Orders, is a federal question arising under 25 U.S.C. §1331. It seeks enforcement of an expression of Navajo sovereign authority and mandates to protect all people equally, as provided by Treaties and statutes. The enforcement action is consistent with the Federal mandate that individuals be treated equally under Navajo law. 25 U.S.C. §1302(8). It is consistent with the BIA executive agreement Indian Self Determination Act judicial program services contract, protected by Treaties. Appendix pg. 548. All federal questions not challenging any state or Navajo sovereignty. Declaring the Navajo Nation Courts lack authority when their courts are immune from suit in Federal Court is not a

federal question authorized activity. Minor, Auto-Owners, *supra*. Petitioners' standing to bring patients claims lies in Navajo culture and tradition, outside Federal Court authority to review. Appendix pg. 467a. Santa Clara Pueblo, *supra*.

The conflicts in Indian law are so great, the same circuit, depending on the panel, can issue two opposite decisions involving non Indian and Tribal Court authority over them. One Court relies on Montana and its progeny. The other ignores Montana, though briefed, about a month later, relying on Santa Clara Pueblo. 'Justice' is based on the luck of the draw of the panel. One decision or the other is political, and the other judicial. This petition presents this same conflict to this Court for permanent resolution.

Short Summary

This is a case of first impression. This petition seeks to *enforce*, not challenge, Navajo Nation Court orders, civil authority, with Federal Court full force and effect enforcement. This petition, in its simplest distilled essence, is about what is **not** found anywhere in any of the Federal Court judgments below, including *Montana*'s decision itself, and its progeny's decisions....i.e. the complete lack of Congressional empowerment of the Federal Courts' subject matter jurisdiction to review and/or diminish exclusive Navajo Nation Court civil law authority over non Indians in any respect whatsoever, save as Congress so limits (such as the Price Anderson Act, for example). It is a case, where looking at the *negative* of the picture, gives a better understanding of the picture, than looking at the picture as painted under Montana and its progeny.

Petitioners challenge all acts of the Federal Courts below refusing enforcement of these Navajo Court orders, and *de novo* review of Tribal Court decisions, as lacking subject matter jurisdiction to do so. Federal Courts have 28 U.S.C. §1331 duty to duty to give nothing less than full force and effect enforcement to these Navajo Court orders, decrees and judgments, resulting from consummation of Congressional Treaties and statutes, and negotiated Executive agreements, as the will of the people as a whole. The MacArthur District Court asks, "Years ago, one discerning critic framed the essential query in these words: "If, Indians reasoned, justice is for society's benefit, why isn't our justice accepted?" Vine Deloria, Jr.,*Custer Died for Your Sins: An Indian Manifesto* 9 (1969). MacArthur at fn. 135, Appendix 348a. Mr. Riggs uncle died for this Country in World War II in Anzio. Mr. Riggs has no Court in which he can obtain redress for his rights because he is an Indian with non Indian defendants.

U.S. citizen Petitioners have standing to seek enforcement of these Orders by their Federal and International law protected right to due process under the exclusive laws of the area, and the Navajo Nation Treaty of 1849 Art. III , Treaty of 1868 Art. 5, and the Indian Civil Rights Act (25 U.S.C. §1302(8) the Navajo Court orders upheld, the lack of enforcement of which would undermine Congress' intent to protect individuals receiving the equal protection of Tribal laws.

Petitioners challenge the use of comity for Navajo orders enforcement. Comity undermines the supremacy of federal public policy over all other interests. It violates the Article III's obligation to be bound by Treaties and Executive Agreements, and

uphold the United States fiduciary duty to the Navajo Nation. Navajo Nation v. United States, 2007, supra. *MacArthur* at 1017 and fn. 176. Appendix pg. 239a, 241a, 403a, 422a. Article III duties to enforce the will of the people is violated. Pink, Belmont, Curtiss, Dames, Youngstown, *supra*.

Purpose and Content of the Navajo Orders

This is a case of first impression. The U.S.-trained U. S./Navajo citizen judge, issued these orders after 6 hearings (Appendix pg. 507a), one 19 hours long (Appendix pg. 477a), accepting nearly all their evidence and live witness testimony with Navajo Bar associated counsel, examination and cross examination in the Court's presence (Appendix pg. 467a). The Respondents argued two Navajo counterclaims; fraud, and lack of subject matter jurisdiction. They fully litigated the liability issues of their fraud (albeit false) claim for about a year in Navajo Court, and oppressed the Petitioners with seven years of *expensive* federal court litigation using Montana as a cloak for law violations.

These Respondents (except Truck and Mr. Ickes), named jointly and severally (Appendix pg. 519a, 525a), **undividedly and voluntarily**, freely chose to litigate their own Navajo common law *fraud counterclaims* (albeit false fraud claims) over nine months. (Appendix pg. 486a, 496a). What is not in the picture, is the Navajo Court distinguishing between the County and District defendants, since the County was the District, and the evidence before the Court showed this. ***It was never argued in Navajo Court otherwise, and even not in Federal Court until after the Tenth Circuits 2002 decision.*** Nearly all their evidence was

fully accepted, with live witnesses in the presence of the Court, with examination and cross-examination, in over six hearings (Appendix pg. 507a), one 19 hours long (Appendix pg. 477a), under Navajo Rules of Civil Procedure nearly identical to Federal and State rules, by and through Navajo Bar associated counsel (bound by ABA Rules of Professional Conduct), with Respondents' violation of these rules as funded by Truck/Farmer's/Insurance (Appendix pgs. 507a- 509a). Save Truck and Mr. Ickes, who also did not exhaust Navajo Court remedies as they could have under 7 NNC §303, *no Respondents filed counterclaims for relief from Navajo Court in Federal District Court either.*

The Tenth Circuit dismissed the County though it never even filed a cross-appeal contrary to this Court's holding in El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479 (1999) (Absent a cross-appeal, an appellee ....may not "attack the decree with a view either to enlarging his own rights there under or of lessening the rights of his adversary.") Notably, contrary to the appealed Tenth Circuit Court's *factual* findings, these Petitioners and the Court did *nothing* to stop or prevent Respondents (including Mr. Ickes and Truck/Farmer's/Zurich) from *immediately* or *at any time*, exhausting the Navajo Court for relief from Navajo jurisdiction via a Petition for an Extraordinary Writ to prevent Navajo District Court's from exercising unwarranted jurisdiction, 7 NNC § 303 [6], or seeking federal injunction relief. Appendix pg. 531a.

Petitioners challenge the '*de novo*' review of Tribal Court acts without deference to them as *ultra vires.*

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[6] *http://www.ongd.navajo.org/files/nnca.pdf*

Acts occurred in Indian Country, where there is no state/Indian checker boarding of jurisdiction.

Petitioners submit that the only fact of any consequence under their view of Indian law, is did the act complained of occur within the exterior boundaries of the Navajo Indian Reservation as found in the BIA-sanctioned 7 NNC §253.

The Navajo Court- identified actions , initially occurred (1) at Montezuma Creek Clinic, on a small square of state checker board trust lands set aside for the Navajo people [7], within the Aneth Extension of the Navajo Nation [8], purchased by the Navajo Tribal funds reimbursed by the United States in 1938 [9], and (2) in the Navajo Courtroom itself in Shiprock, New Mexico's area of the Navajo Nation. (Appendix pg. 507a-508a). The Montezuma Creek Clinic area is governed by the Aneth Chapter. (Appendix pg. 564). Delivery of services is effected in the Red Mesa Chapter area also. (Appendix pg. 568a). The land clearly is within Navajo Indian Country. Alaska v.

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[7] The Tenth Circuit Court found, that even off reservation trust land is defined as 'Indian Country".HRI, Inc. v. Enviromental Protection Agency, 198 F. 3d 1224 (10th Cir. 2000). If the property is set aside for use of Indians or is subject to Federal supervision (as with this IHS contract), the area can qualify as "Indian Country." Id.

[8] Congressional Act of March 1, 1933. 47 Stat., 1418 "An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes." ("1933 act"). MacArthur at 959, Appendix pg. 135a.

[9] Chapter 570, August 9, 1937. [[H. R. 6958.] 50 Stat., 564 (federal appropriations bill for 1938 reimbursing the Navajo Nation for its purchase of the lands in the 1933 act.

Native Village of Venetie Tribal Government, 522 U.S. 520 (1998) as codified in 7 NNC 254, 18 U.S.C. 1151.

Congress did away with checker boarding of state and Indian jurisdiction civilly and criminally in 18 U.S.C. 1151, as upheld in Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 358 (1962), United States v. Mazurie, 419 U.S. 544, 557, (1975) [10] and Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964)(that has not been overturned *en banc* as is required by the Tenth Circuit in Burlington Northern & Santa Fe Ry. Co. v. Burton, 270 F.3d 942 (10th Cir. 2001).

The Aneth Extension Act, to which Utah agreed [11], preserved to Utah only two authorities- to collect, share, and spend mineral royalties on the Navajo Nation people, and to trade the lands set aside for Navajo Nation use, for other 'in lieu' lands, outside the Navajo borders, of approximately the same value, relinquishing all rights.

This statute thereby preserved Sec. 6 of the Utah Enabling Act of 1894. Therefore, a United States fiduciary duty exists to protect the U.S. citizen Navajo people and those to whom they extend their equal protections of the law, any 'person'. Navajo Bill of Rights, 25 U.S.C. 1302(8). This duty is violated, *ultra vires*, when Federal Courts become the fiduciary for the non Indian interests harming them, refusing to enforce the result of the consummation of the Executive agreements. Navajo Nation v. United

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[10] Mazurie at 547 ("Indian country" was defined by 18 U.S.C. 1151 to include non-Indian-held lands "within the limits of any Indian reservation.")

[11] See "Navajo Indian Reservation SENATE DOC 64, 72ND CONG. 1ST Session; House Report No. 1883 72nd Cong. 2nd Session.

States, Federal Circuit Court of Appeals, 2006-2059, Sept. 13, 2007. Pink [12], Belmont [13], Curtiss [14], Dames [15] ;Missouri v. Holland, 252 U.S. 416, 432 (1920).

Any other state or federal laws, agency rulings, or other law of a general nature must be read favorably for the Navajo Nation's sovereign authority over the Navajo Nation, consistent with and necessarily restricted by, International treaty protections, as in the Treaties cited below, preserving to the Navajo people their rights of exclusion and self-determination, the Supreme Law of the Land.

Unique Vulnerability of the Navajo population sought to be protected.

The Tenth Circuit's decision that this is a mere employment case, shows the Court was not giving any deference whatsoever to the U.S.-trained and funded Navajo Court's findings for patient help. Appendix pg. 8a. In this area diabetes is epidemic (1 in 4 within the Utah strip of the Navajo Nation). Newly published research and testimony shows that the I.H.S. patient population of Montezuma Creek Clinic were suffering

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[12] U.S. v. Pink, 315 U.S. 203,242 (1942) ("..the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues .... ")

[13] U.S. v. Belmont, 301 U.S. 324, 329-330 (1937) ("...when judicial authority is invoked in aid of such consummation [powers of foreign courts by Treaties and executive agreements], State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision.")

[14] U.S. v. Curtiss-Wright Export Corp. 299 U.S. 304, 319 (1936)("the power to make such international agreements ... [is] not in the provisions of the Constitution, but in the law of nations.")

[15] Dames & Moore v. Regan, 453 U.S. 654, 668 (1981)

from being downwinders[16] , and also from radiation, hazardous, toxic waste exposures of air, soil, water, vegetation, and domestic and wild animals as food associated with mining, for decades. Newly released research by the Los Angeles Times writer Judy Pasternak reports[17], and Congressman Waxman's Oct. 23, 2007 House Committee Government Oversight and Reform hearing[18] demonstrate the vulnerability of the patients this Navajo Court was trying to protect.

Using Montana, mostly non Indian Respondents continued their Navajo Court order-disobedience with continued Navajo Court-identified harms.

16http://www.gallupindependent.com/2007/jan/011107kh_nvjutcms nradvctms.html

17 http://www.latimes.com/news/nationworld/nation/la-na-navajo19nov19,0,1645689.story?page=8

18 Hearing on the Health and Environmental Impacts of Uranium Contamination in the Navajo Nation http://oversight.house.gov/story.asp?ID=1560; http://www.radiationcontrol.utah.gov/Board/Agenda.pdf

> "Over the years, open pit mines filled with rain, and Navajos used the resulting pools for drinking water and to water their herds. Mill tailings and chunks of uranium ore were used to build foundations, floors, and walls for some Navajo homes. Families lived in these radioactive structures for decades. Radioactive dust from abandoned mines and waste piles blew in the air and was inhaled by those who lived nearby. Navajo children played in the mines and the piles of radioactive debris. They drank contaminated water that came straight from the mines. .... Navajo kids were swimming in open pit uranium mines in the 1990s..... Half-measures or outright neglect has been the official response. ....."

Id.

These facts are not Navajo jurisdiction determinative, save if Montana is still good law. However they illustrate why this petition is of national importance. Once on full judicial notice of their harmful acts, via the Navajo Court orders, with access to County Attorney Halls, Doug Moeller, esq., Mr. R. **Dennis Ickes, Esq., their private counsel of choice, they continue their Navajo Court- prohibited actions, purposely withholding the Navajo Court designated relief.** Appendix pg. 559a. The uniqueness of these Navajo people's vulnerabilities and pacifist strengths can best be understood by reference to the history of the Navajo Nation with the white man and San Juan County. Appendix pg. 559-560. Ex- San Juan County Commissioner Maryboy"s affidavit. Appendix pg. 510. MacArthur at 985 fn. 135, Appendix pg. 384, fn. 135.

The Navajo orders were to prevent further interference with the Montezuma Creek Clinic under the new management -as the Navajo Court well understood. Appendix pg. 481. Respondents may argue that in 2000 they no longer had authority over the clinic so the judgments were moot nearly immediately. *Mootness is a fact based judicial doctrine that can only be determined under Navajo Court determinations.* Certainly the relief to the Petitioners is in their grasp. Petitioners did not work for the *clinic*, they were employed by the privately insured, County-controlled District that can rehire them even for a day, in their medical provider positions, to calculate all their back pay and benefits. It is for a Navajo Court to determine.

Respondents may argue the lack of patient visits in 2000 and afterward was Mrs. Singer's and the Utah Navajo Health System's fault. Respondents continued acts directly interfered with UNHS' and Mrs. Singer's

best efforts to convince patients, receiving bills or being brought into STATE court under bench warrants for bills, they could have free care at the clinic. Appendix pg. 515a, and 560-561.

The Navajo Nation Court is the Best Court to Know the People, Culture, and Overall Conditions of the Area and Non Indian Courts did not Listen

The Navajo Court, familiar with the ways of the people, understood this ahead of time, and issued fines for continued irreparable harms, even for appeals. These fines, now of tens of millions, are intended for the Court to distribute to the people of the area, *not* the Petitioners. Appendix pg. 503a, 562 . Considering the population is 6-7000, the fines are miniscule compared to Jury awards in some places for clergy abuses of even a hundred people or so. Such is well within Truck/Farmer's/Zurich Financial Services budget who has been consistently aware of the litigation, and funded the litigation all along. Appendix pg. 507a. Truck could have ordered Respondents to obey the orders, and pay as told, then seek relief, but failed to do so. Or it could have asked the Court to place payment of the Injunction in escrow. Truck could have ordered settlement. They could have sought immediate relief under 7 NNC §303 and did not. Notably, some States name insurers as parties if insurance is involved. Raskob v. Sanchez and Allstate insurance co., Docket No. 24,476, New Mexico Supreme Court, 1998-NMSC-045, Nov. 23,1998. Here, Petitioners maintain Truck controlled and financed the bad faith litigation. The Navajo Court agreed. Appendix 507a. *If Truck is not added back as a party, all non Indian insurers covering non Indian businesses within the Navajo*

Nation, will not have to worry about paying claims to those injured who are not in a direct contractual relationship with the non Indian insurer. As here, those not paid for injuries, have no courts of redress unless this petition is accepted. Such ideas violates BIA- sanctioned U.S. and Navajo public policy. Appendix pg. 507a.

The false fraud claims against the Petitioners still arise to their harm in an area where memories of people are generation-ally long. Appendix pg. 560-561. The Court noted some diabetic patients had not been seen for three or more months and that there was a 250% drop in diabetic visits [increase in absentee rates]. Appendix pg. 469a. Aneth and Red Mesa Chapters governing the east Utah portion of the Navajo Nation, informed the Navajo Nation of the harms done to the people by displacing Petitioners (at the time Mr. Riggs was suspended). Appendix pg. 564a-571a.

By 2003, we can observe (1) an increase in the number of patients on dialysis and who are dying, and the interference with UNHS' management of the Montezuma Creek Clinic (Appendix pg. 557) despite Petitioners' best efforts to convince people to return to the clinic for their free federally insured health care; and (2) Dr. Jane Shelby analyzes a survey showing of the English speaking survey respondents, showing, 63 survey respondents still knew of people not going anywhere for care. (Appendix pg. 576a-577a). In 2002, the Senate Committee on Indian Affairs, Judge Robert Yazzie, of the Navajo Supreme Court, warned how essential Navajo Court authority over non Indians was vital to the safety of the Navajo people and self-

governance. [19] The 2005 Utah Vital Statistics Table 22 [20] shows a spike in the number of deaths of people in San Juan County for the years 2001 while the billing was still going on, and again in 2003 when the survey was taken. It is unknown in what area of the county these deaths occurred. Similarly, it is impossible to know how many effected patients moved out of the area or went to Colorado, New Mexico, or Arizona for treatment or to die.

Failure of the Respondents to Marshall any Law or Facts that Give Federal Courts Authority to Dismiss Them from a Navajo Court Action even under Montana and its Progeny, if Still Valid Law

To date, contrary to the lower Court 'presumptions' for these Respondents, the Respondents have failed to marshal;
(1) any law or public policy they were upholding, enforcing, or not violating;
(2) any Utah law definitions of them carrying out 'police powers', as *Utah* defines them, (not Colorado or other states, as the 10th Circuit did (Appendix pg. 30a)
(3) any state law statutes demanding they voluntarily enter into the private business enterprise of operating a health clinic profiting from federal medical insurance of Navajo people, so as to lessen the property tax burdens on the northern county predominantly white tax payers;

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[19] Address of Honorable Chief Justice Robert Yazzie to the Committee of Indian Affairs, 2000, ' section 6 'Juries' http://www.senate.gov/~scia/2002hrgs/022702trust/yazzie.PDF.

[20] http://health.utah.gov/vitalrecords/pub_vs/ia05/05bx.pdf page S-25

(4) any facts or law as to how obeying this Navajo Court orders would have interfered with their *contractual duties,* to protect the patients, be sensitive to their cultures, and obey Tribal law, and bring the County government to a stand still (Appendix pg. 473a, 493a) ;

(5) any Utah state law that gives them immunity for NAVAJO law violations, is immunity outside Utah's legislative authority under Utah's disclaimer Enabling act and U.S. Constitutional Article VI, and Navajo Treaty of 1849 and 1868 limits,(McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); Williams v. Lee, 358 U.S. 217, (1959) (MacArthur at 978-979, 983, 1011 and fn. 176, 1013, 1053- 1054 and fn. 93, Appendix at 172a, 183a, 182a, 231a, 234a, 306a, 307a, 361a, 363a fn. 93));

(6) any explanation of how, contrary to lower court factual findings relying SOLELY on County Counsel's colloquy, the County was not completely controlling the Health District's compliance with the Health Districts' voluntarily bid upon Indian Health Service independent contractor contract [21];

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[21] The Navajo Court cites as to how Rick Bailey, was both the County Commission's administrator and the San Juan Health Service District's CEO. (Appendix pg. 476). He was counseled by San Juan County's attorney Craig Halls to be the Petitioner's administrative hearing officer, even though he participated in their termination and discipline. Appendix pg. 519a, and 460a. Ex Commissioner Maryboy's assertion in Court and by affidavit witnesses that the County Commissioners ran the Health District. Appendix pg. 514. All were named jointly and severally in Navajo Court and *did nothing* to argue differently in that Court. Theoretically, at least, if all rely on Mr. Halls non-State sanctioned Navajo law advice, and he is immune by these Courts for his civil

(7) any explanation of how the state's fisc is at risk, or the State was ordering or requiring the Respondents intentionally harm these Patients, petitioners, and the Court, such that they should be cloaked with state sovereign immunity, Northern, supra;
(8) Nor has a single case or statute been cited giving these privately insured quasi-corporate entities immunity for contract breaches, as identified by the Navajo Court. Appendix pg. 473a, 493a.

REASONS FOR GRANTING THE PETITION

Standard of Review

The standard of review of a Federal Court's subject matter jurisdiction is *de novo*. High Country Citizens Alliance v. Clarke, 454 F.3d 1177, 1180 (10th Cir. 2006) (citations omitted). Likewise, interpretations of Treaties, Statutes, and the like are reviewed *de novo*. Utah v. Babbitt 53 F.3d 1145, 1148 (10th Cir. 1995).

Accepting this Petition, and granting Petitioners their relief, (1) will help resolve the following seven areas of conflicts in Indian Law, (2) will introduce six new or different approaches to resolving these conflicts, and (3) will harmonize Indian law with the 12 step plan endorsed by the United States, Navajo, and International Communities.

List of Conflicts to be Resolved

Navajo law advice, outside a duty of a Utah state officer, then all will be immune- theoretically that is.

Petitioners assert this petition should be accepted based on the appealed Tenth Circuit decision
(1) creating inter-circuit conflicts in giving federally recognized U.S. Indian Treaty Nation Courts comity or full faith and credit. (MacArthur at 1016-1017;Appendix pg. 241a);
(2) creating interstate conflicts on federal questions (MacArthur at 1018-1019;Appendix pg. 243);
(2) creating conflicts with Supreme Court decisions on federal questions, as discussed below (MacArthur generally throughout);
(3) raising questions of national importance, exemplified by how serious the damages to unprotected Tribal Court parties can be, as discussed above;
(4) identifying other Supreme Court decisions where, Petitioners respectfully assert, this Court erred in not examining the unique Navajo history, and doing an extensive required *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U. S. 845, 855-856 (1985) analysis, of this Court's own authority, as in Atkinson (MacArthur at 962; Appendix pg. 140a) ;
(5) demonstrating Montana's doctrine is vague, unpredictable, without restraint on Courts as it is not moored to any currently viable laws, creating political, rather than judicial decisions, compare Montana with Hicks and Atkinson (MacArthur fns. 139, 232, and 90; Appendix pgs. 358a, 427a, 362.)
(6) *de facto* eliminates Navajo culture and tradition as a basis for Navajo Court rulings, *contra* Congressional purposes of the Indian Civil Rights Act as predicted by Santa Clara Pueblo. MacArthur at 995, Appendix pg. 204a.
(7) conflicting with new Tenth Circuit law Minor v. Muskegee Creek Nation, 2007 U.S. App. LEXIS 22432, issued September 19,2007 (Not allowing non Indian to

challenge the authority of the Court over non Indians, since the Nation has the same sovereign immunity from suit as the United States.)

The Petition Should be Accepted Because Petitioners Present Six Revolutionary Arguments as to Why the Lower Courts Acted Outside Their Subject Matter Jurisdiction and Conflicts can be Resolved

Petitioners are grateful to the U.S. District Court's exhaustive efforts in this case that enlightens all concerned as published in MacArthur v. San Juan County, 416 F. Supp. 2d 1098, 2005 U.S. Dist. LEXIS 25235 (D. Utah, 2005) and attached to the petition in accord with the Supreme Court rules. U. S. v. Lara 2004 U.S. LEXIS 2738,*23-25;541 U.S. 193), and Lone Wolf v. Hitchcock, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 (1903) , agree Congress' authority is plenary in Indian affairs. If 'plenary', then the Courts have correspondingly none. The Executive's authority in foreign affairs and international law is without question. Pink, Belmont, Curtiss, Dames, Youngstown, *supra*. This Court's duty to examine its own jurisdiction an adjust its own powers accordingly is without question. Freytag v. Commissioner, 501 U.S. 868 (1991)(J. Scalia concurrence). Congress leaves the Federal Court no authority to review Navajo Court decisions, and the Constitution obliges it to enforce Treaties and statutes and executive agreements, conflicts in Indian law are resolved. Santa Clara at 65-66. MacArthur at 988. Appendix pg. 191a.

(1) The Navajo Orders were issued pursuant to an Executive Agreement, protected and consistent with Treaties and statutes. Just as this Court observed

Russian decrees to be the U.S. Constitution's Article VI Supreme Law of the Land, binding on all courts without policy review, so should the Navajo decrees be treated likewise. Pink, Belmont, Curtiss Dames ;Missouri v. Holland,, *supra.* Contrary to the Tenth Circuit's holding that enforcement of Tribal Orders is within the Federal Court's discretion (Appendix pg. 2a), it is mandatory, or otherwise a Court is interfering with the will of the people as a whole. Id. The MacArthur Court did not discuss the Bureau of Indian Affairs Contract, though it was submitted to the Court. Appendix pg. 318a. MacArthur at fn. 4.

(2) It is 'irrebuttable' that Congress and the Executive have pre-empted and reversed *Montana*'s doctrine's presumption against Tribal Court authority over non Indians, also, correspondingly eliminating this Court's subject matter jurisdiction to review the Navajo Nation Court actions.[[22]]Appendix pgs. 190a-192a. MacArthur at 988-989. Congressional and Executive actions have restored to the Navajo

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[22] The 2000 repeal of the allotment act (25 USC §§301-303) (*Ex Parte McCardle*, 74 U.S. 506 (1868)); The Indian Civil Rights Act of 1968 (25 U.S.C. §§1301-1326); the Indian Self-Determination Act (25 U.S.C. §§450, 450a-450nn); the Tribal Justice Support Act (25 U.S.C. §§3601-3631); the Indian Tribal Justice Support and Legal Assistance Act of 2000 (25 U.S.C. §§3651-3681); the Indian self-governance act (25 U.S.C. 458aa et seq.); Utah's Enabling Act of 1894 Section 3 Second, Section 6;; the Congressional Act of March 1, 1933. 47 Stat., 1418 "An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes." ("1933 act"); Chapter 570, August 9, 1937. [[H. R. 6958.] 50 Stat., 564 (federal appropriations bill for 1938 reimbursing the Navajo Nation for its purchase of the lands in the 1933 act.

Nation the civil jurisdiction it had over all within its borders, taken initially by the BIA Court of Indian Offenses, in 1892 (MacArthur at 966, Appendix pg. 145a-147a) without its formal permission or compensation payment. Such reasoning is in accord with International Treaties, the Article VI supreme law of the land. See; a. The Treaty of Guadalupe Hildago of 1848,(signed March 16, 1848 and ratifications exchanged May 30, 1848) Art. XI promises exclusive United States authority over the Mexican-treaty bound Navajo Nation; b. The U.S.-Navajo Treaty of 1849 (9 stat. 974) Article 1 promises 'forever' exclusive federal government 'jurisdiction and protection' over the Navajo Nation; c. Treaty of 1868 does not restrict this promise as upheld by this court; d. The U.N. charter was ratified and signed United Nations Charter, art. 73(a), and (b), 59 Stat. 1031, 1051(June 26, 1945 (recognizing self-determination of states territories); e. the U.N. International Covenant on Civil and Political Rights,)(signed 5 Oct.1977 ratified 8 Jun 1992) Art. 1 (recognizing self-determination for Indian Nations), Art. 16, Art.17 sec. 1 (entitled to be free from unlawful attacks on his honour or reputation), Art. 26 (equality before the law), Art. 27 (preserving ethnic minority rights to enjoy their own culture, religion, and language), signed 5 Oct 1977, ratified 8 Jun 1992 .

(3) The Atkinson Court ruling was in error.

(a) using Montana's Crow Nation Treaty and history to effectively displaces Congressional purposes of the Navajo Nation treaties of 1849 and 1868, and 1933 Aneth Extension Act and Utah law. MacArthur at 962 (Appendix pg. 140a),

(b) failing to observe the Navajo Nation is like unto the Choctaw and Cherokee Nations the *Montana* Court exempted from its doctrine, Montana fn. 5, as verified by this Court's Navajo trilogy, as found in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965); Williams v. Lee, 358 U.S. 217, (1959) (MacArthur at 978-979, 983, 1011 and fn. 176, 1013, 1053- 1054 and fn. 93, Appendix at 172a, 183a, 182a, 231a, 234a, 306a, 307a, 361a, 363a fn. 93).

(4) Congress never gave its required authority to Federal Courts to review Navajo Court decisions. Santa Clara, *supra*. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Congress affirmatively displaced such Federal Court presumptions, and thus, its authority to review Navajo Nation sovereign's Court decisions. MacArthur at 995, Appendix pg. 204a.

(5) All other branches of law are superior authorities in Indian affairs to 1981 judicially made federal common law of Montana and its progeny. Santa Clara Pueblo, *supra*. Lone Wolf, *supra*. This Tenth Circuit decision shows all known Indian law, other than Montana and is progeny, observes Navajo law and Navajo Courts are the exclusive law and forum for resolving civil disputes within the Navajo Nation over Indians and non Indians alike. Congress expressly prohibits state law from applying therein under 25 U.S.C. §§1322-1326, McClanahan, Warren, Williams, supra. MacArthur at 995, Appendix pg. 202a-203a.

(6) The United States and the International Community accept, ratify, uphold a design of Indian

Nation self-determination that supersedes state interests. This tragic case demonstrates why Tribal Court authority over non Indians is essential to self governance, as Congress dictates in 25 U.S.C. §§1301(2) and 1302(8), to protect all 'people', Indian and non Indian alike, within the Navajo Nation exterior borders.

Based on the foregoing, all the lower court actions that refuse to enforce the Navajo Court orders are void, as if they never occurred. Elliot v. Piersol, 1 Pet. 328, 340, (1828). See Void Judgment Black's Law Dictionary Sixth Edition Page 1574. The retrying of the case that took place in each lower court is void. Hilton v. Guyot, 159 U.S. 113, 203 (1895) ("[T]he merits of the case should not . . . be tried afresh . . . upon the mere assertion. . . that the judgment was erroneous in law or in fact.").

Accepting this Petition and Granting Petitioners Their Tendered Solution to Indian Law Conflicts is Consistent with America's 12 Step Plan for United States Indian Nation Self-Determination and Self-Governance.

The U.S. District Court's outstanding National Farmer's analysis shows the Montana doctrine violates 12 foundational legal principals of American Indian law. All the above law sources with which Montana conflicts, upholds these bedrock principals.

(1) Treaties and statutes thereto are the supreme law of the land binding on Federal Judges and states. Art. VI. U.S. Constitution. MacArthur pg. 987, Appendix pg. 187a.

(2) America as a whole has adopted the Treaties supporting equal protection of Navajo law over Indian and non Indian alike, and Navajo Nation self-determination and self-governance abilities to prevent harm to any 'person' within its Navajo Nation Indian Country. See, Treaties and statutes cited above.

(3) Congress carries out these Treaties by statutes including particularly, 25 U.S.C. §§3601 et seq; and §§3651 et seq.. MacArthur at 988, Appendix pg. 191.

(4) (In keeping with these Treaties' requirements, the U.S. promises to the world, that all 'persons' have 'equal' access to legal remedies. [23]

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[23] **1994 Report of the United States of America** to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, Article 3("The rights enumerated in the Covenant and provided by U.S. law are guaranteed equally to men and women in the United States"); Article 1, II Native Americans ("The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation. Fisher v. District Court, 424 U.S. 382 (1976). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, and, as a result, "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." Iowa mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).");

Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights ¶¶18, 21, 26 and Article 26¶ 437 ("....all persons in the United States are equal before the law. .... all persons in the United States enjoy the equal protection of the laws.....") http://www.state.gov/g/drl/rls/55504.htm#art2

(5) (The President has authority to enter not only Treaties, but also Executive Agreements, as the Article VI supreme law of the land. [24]

(6) Indian Nations have a sovereign-to sovereign relationship with the United States not subject to state laws. McClanahan and Progeny. MacArthur at 944 fn. 76, Appendix pg. 354a-355a. .

(7) Federal Courts have a mandatory duty to enforce and uphold court orders fostered and protected by Executive Agreements including those made with the Navajo Nation judicial program, to provide judicial services in the Navajo Nation, enforcing Navajo law, equally in a uniform and fair manner, (Appendix pg. 548 et seq) constitute the Executive carrying out Treaty obligations and statutory expressions of those obligations found in the Indian Self-Determination Act, enforcing the U.N. International Covenant of Civil and Political Rights Treaty, U.N. charter, the Supreme Law of the Land. Article VI. Pink, Belmont, *supra*.

(8) Aside from the Indian Civil Rights act, Congress and the Executive have never diminished Navajo Court authority over non Indians, MacArthur at 989, fn. 139, Appendix pg. 385 fn. 139, and has affirmatively barred state law from applying therein. Utah Enabling Act, 1933 act, 25 U.S.C. §§1323-1326, Santa Clara, McClanahan, Williams, Warren, *supra*

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[24] Pink, Belmont, Dames, Curtiss, and Youngstown Sheet and Tube Co. v. Sawyer, *343 U.S. 579*, 585-86(1952)(President's power is the strongest when it is furthering a Constitutional or and act of Congress). MacArthur at 943, fn. 75, Appendix pg. 352a fn. 75.

(9) The Treaty-, Statute-, Executive Agreement sanctioned- Navajo Bill of Rights and Navajo statutes 7 NNC §§253, 254, *supra*, mandates Navajo law apply equally to all people, persons, entities, on all land types, no matter the land type or ownership, within Navajo Nation borders, previously adopted, and not diminished by the Indian Civil Rights Act, is the Supreme Law of the Land, Navajo orders binding on all States and Judges. Article VI, Pink, Belmont, Curtiss, Dames, Youngstown Sheet and Tube Co. v. Sawyer, *343 U.S. 579*, 585-86(1952)(President's power is the strongest when it is furthering a Constitutional or and act of Congress).

(10) Article III Courts are not allowed to write law from the bench, as doing so would infringe on both the Congress and Executive authority. MacArthur at 954 fn. 93 . Appendix pg. 538a, fn. 93. Montana is "judicially made" federal common law. MacArthur at 987, citing Lara, *supra*; Appendix pg. 188a.

(11) Article III Courts are bound to the U.S. fiduciary trust responsibility to the Indian Nations.

a. Chief Justice John Marshall's opinion in Cherokee Nation v. Georgia (1831), 30 U.S. 1,(1831) held Indian tribes are "domestic dependent nations" resembling "that of a ward.";

b. In Worcester v. Georgia 31 U.S. 515 (1832) Marshall referred to tribes as being "under the protection of the United States."

c. Morton v. Mancari 417 U.S. 535 (1974)cited to "Congress's unique obligations toward the Indian....";

d. In Nevada v. U.S. (1983) 463 U.S. 110, 103 S.Ct. 2906, 7 L.Ed.2d 509 (1983) the Court emphasized that the "United States owes a strong fiduciary duty to its Indian wards."

(12) Congress has not authorized Article III Courts to review Tribal Court actions, save habeas relief in criminal cases (25 U.S.C. §1303). Santa Clara Pueblo pgs. 65-66 and fn. 26

Petitioners have found no law contrary to these 12 principals enforcing the Navajo orders, decrees, judgments of all types, upholds. Most respectfully, there is no authority for Federal Courts to violate them. U.S.-drafted Navajo treaties of 1849 and 1868, protected by U.N. treaties sighted above, Executive agreements and statutes, are contracts to be read broadly and favorably for the Indians, and keeping with America's fiduciary duty to the U.S./Navajo citizens and persons protected within the Navajo nation. McClanahan and Progeny. Kinney v. Clark, 1844 U.S. Lexis 32, *, 43 U.S. 76.

CONCLUSION

Based on the foregoing, Petitioners pray for this Court to accept their petition and to grant them all other relief that is fair in equity and just under the law.

Respectfully submitted
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(any footnotes trail end of each document)

No. 05-4295, 05-4310

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STEVEN MACARTHUR; NATHANIEL PENN; MICHELLE LYMAN; HELEN VALDEZ; CANDACE LAWS; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; CANDACE HOLIDAY, NICOLE ROBERTS, Plaintiffs, and ALISON DICKSON; DONNA SINGER; FRED RIGGS, Plaintiffs-Appellants/Cross-Appellees, v. SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; JAMES D. REDD; L. VAL JONES; MANFRED R. NELSON; RICHARD BAILEY; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE, also known as Laurie Walker; ST. PAUL'S INSURANCE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; R. DENNIS ICKES; LAURIE SCHAFER; LYN STEVENS, San Juan County Commissioner; MANUEL MORGAN, San Juan County Commissioner; NETTIE PRACK; GLEN IMEL, Defendants-Appellees/Cross-Appellants.

July 18, 2007, Filed

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JUDGES: Before KELLY, EBEL, and McCONNELL, Circuit Judges.

OPINION BY: KELLY

OPINION

KELLY, Circuit Judge.

Plaintiffs in this case seek enforcement of several preliminary injunction orders issued by a court of the Navajo Nation. Although the decision to enforce a non-final tribal court judgment is a matter of discretion, federal courts will ordinarily err on the side of enforcement of such judgments in the name of comity. We will not enforce a tribal court judgment, however, when the tribal court lacked subject matter jurisdiction. In the realm of tribal court jurisdiction, the regulatory authority of the tribe is often the issue which looms largest, and this case is no exception. Among other things, these appeals require us to examine the regulatory authority of the Navajo Nation over the activities of a nonmember of the tribe when the regulated entity is another independent sovereign acting in its governmental capacity.

Plaintiffs-Appellants Donna Singer, Fred Riggs, and Alison Dickson (collectively "Plaintiffs") appeal the federal district court's refusal to enforce three preliminary injunction orders issued by a Navajo district court against San Juan County, San Juan Health Services District ("SJHSD"), and numerous employees of those entities (collectively "Defendants"). Although the district court's judgment was ultimately in their favor, SJHSD and certain of its employees involved in the litigation also cross-appeal from the district court's judgment that the Navajo Nation possessed civil jurisdiction over several of the claims asserted against SJHSD, Roger Atcitty, and Reid Wood. In its opinion below, the district court explained that it would not enforce the preliminary injunction orders because, inter alia, the Navajo Nation lacks regulatory authority over many of the Defendants, the preliminary injunction is interlocutory in nature, much of the preliminary injunction is now moot, and Defendants are nearly all entitled to sovereign immunity. *See* MacArthur v. San Juan County, 391 F. Supp. 2d 895, 1056-57 (D. Utah 2005). *Our jurisdiction arises under* 28 U.S.C. § 1291, *and we reverse the district court insofar as it held that the Navajo Nation possessed regulatory and adjudicative authority over Plaintiffs' employment-related claims against SJHSD and Mr. Riggs's defamation claim against Reid Wood. We do, however, ultimately affirm the district court's judgment refusing to enforce the tribal court's preliminary injunction orders.*

Background

Because Plaintiffs do not appear to challenge the federal district court's factual recitation, we rely primarily on its version of the facts. Donna Singer,

Fred Riggs, and Alison Dickson brought suit against San Juan County, SJHSD, and several employees of those entities in Navajo district court in August 2000. The specific defendants in that case relevant to these appeals were as follows: San Juan County, Utah; SJHSD; San Juan County Commissioners J. Tyron Lewis and Bill Redd, in their individual and official capacities; San Juan County Attorney Craig Halls, in his individual and official capacity; San Juan County Administrator Richard Bailey, in his individual and official capacity; Roger Atcitty, John Lewis, and Karen Adams, members of SJHSD's Board of Trustees, in their individual and official capacities; Patsy Shumway, member of SJHSD's Board of Trustees, in her official capacity only; Reid Wood, SJHSD's Chief Executive Officer, in his individual and official capacity; and Lauren Shafer, SJHSD's Personnel Director of Nursing, in her individual and official capacity.

SJHSD is a special service district organized pursuant to Utah Code § 17A-2-1304 (1999), and is tasked with providing health care services to the citizens of San Juan County, Utah. At all relevant times, SJHSD operated the Montezuma Creek Health Clinic ("the Clinic"), which is located in San Juan County and within the exterior boundaries of the Navajo Nation. The record indicates that the land on which the Clinic is located is fee land owned by the State of Utah as part of the Navajo Trust Fund. SJHSD relinquished operation of the Clinic as of January 1, 2000, at which time Utah Navajo Health Systems, an entity affiliated with the Navajo tribe, took over operation.

Ms. Singer is the non-Indian spouse of an enrolled member of the Navajo Nation. She lives outside, but

near, the Navajo reservation. Ms. Singer was employed as the manager of the Clinic from 1995 until her termination in December 1998. In the Navajo district court, Ms. Singer alleged that although she was an exempt employee, she was required to keep time cards, allegedly in violation of SJHSD policies. She claimed that on November 13, 1998, a mistake was made on her time card but that she promptly provided a written explanation for the error. Shortly thereafter, she was handed a memorandum by Reid Wood, CEO of SJHSD, referring to allegations of time card fraud and informing her that she was being placed on administrative leave. A second memorandum from Mr. Wood accused her of employment-related misconduct--namely that the number of hours worked, as reflected on her time cards, was inflated--and notified her of the scheduling of a pre-disciplinary hearing. Following a meeting with Ms. Singer on December 4, 1998, Mr. Wood prepared yet another memorandum to her, dated December 7, explaining that due to the inconsistencies in her time cards, she was being terminated. Ms. Singer later filed a complaint with the Office of Navajo Labor Relations ("ONLR") seeking reinstatement. Eventually, Ms. Singer was rehired at the Clinic after its operation was handed over to Utah Navajo Health Systems.

Mr. Riggs is an enrolled member of the Navajo Nation who resides within the exterior boundaries of the Navajo reservation in New Mexico. SJHSD terminated his employment on November 4, 1998 as part of a reduction in force, but immediately rehired him in a lesser position and at a lesser rate of pay on the condition that he keep time cards. According to Mr. Riggs, he was unaware that on his very first time card he underreported the number of hours of leave taken.

As with Ms. Singer, Mr. Wood advised Mr. Riggs in writing that he was accused of time card fraud and placed Mr. Riggs on paid administrative leave. Mr. Riggs likewise had a pre-disciplinary hearing with Mr. Wood on December 4, 1998, but, unlike Ms. Singer, who was terminated, Mr. Wood placed Mr. Riggs on probation for thirty days. Mr. Riggs alleges, however, that he was kept on probation longer than thirty days. On or about December 15, 1998, Mr. Riggs filed a grievance with SJHSD regarding Mr. Wood's disciplinary action, and on February 12, 1999, a grievance hearing was held (the record is unclear as to what the result of this hearing was), but Mr. Riggs avers that the grievance process was tainted by Mr. Wood's influence and lacked impartiality. Mr. Riggs also later filed a grievance with the ONLR. Mr. Riggs remained an employee of the Clinic after Utah Navajo Health Systems assumed operation.

Mr. Dickson, the third plaintiff, is an enrolled member of the Navajo Nation residing within the exterior boundaries of the Navajo Reservation in Utah. Mr. Dickson was initially hired by SJHSD in March 1998 as a full-time, temporary office clerk. He applied for full-time, permanent employment in November or December of 1998 but was refused. Mr. Dickson claims that the refusal to make him a permanent employee violated internal SJHSD policies. He also alleges he was denied a hearing on his grievance. In the Navajo district court, Mr. Dickson also complained about racially insensitive and derogatory remarks allegedly made by Mr. Wood. Like Ms. Singer and Mr. Riggs, Mr. Dickson was permanently employed by Utah Navajo Health Systems at the Clinic after its takeover.

In their complaint filed in the Navajo district court, Plaintiffs asserted numerous claims arising primarily out of their employment at the Clinic. Those claims included the following: violation of the right to free speech as protected by the Navajo Nation, the United Nations, and the United States; violation of the right to freedom of assembly as protected by the Navajo Nation, the United Nations, and the United States; violation of the right to due process as protected by the Navajo Nation, the United Nations, and the United States; wrongful hiring; defamation and tortious interference with future contractual relations; theft; violation of the right to equal protection as protected by the Navajo Nation, the United Nations, and the United States; discrimination as part of an ongoing pattern; intentional and negligent infliction of emotional distress; violation of fiduciary duties; misfeasance; malfeasance in office; obstruction of justice; misuse of judicial process; defamation per se; and the endangerment of Navajo patients.

On December 28, 1999, after holding at least one evidentiary hearing, the Navajo district court found that Plaintiffs' claims had a high likelihood of success on the merits and issued a preliminary injunction ordering Defendants to undertake the following actions: reinstate Ms. Singer and Mr. Riggs to their former positions with full back-pay; offer Mr. Dickson full-time employment with full back-pay and benefits; delete and expunge all disciplinary comments regarding the incidents at issue from Plaintiffs' personnel files; refrain from placing all Physician Assistants on time card requirements; refrain from interfering with clinic operations or moving clinic personnel; pay all attorney's fees, costs, and expenses related to the litigation; and

assist, in any manner necessary, diabetic patients' return to the Clinic for treatment. The court also prohibited Defendants from eliminating emergency medical technician services within the Navajo Nation or interfering with laboratory or pharmaceutical services to the Clinic.

Following Defendants' submission of a motion to dissolve/modify the preliminary injunction, the tribal court issued another order on March 1, 2000, which reiterated the conditions of the prior preliminary injunction and also required Defendants to carry out the conditions of the prior injunction by March 3, 2000, to immediately make payment of past due billings of the Clinic, to refrain from interfering with any form of patient care being provided at the Clinic, and to immediately cease billing eligible IHS patients for medical services. In an effort to further enforce its order, the court informed the parties that Defendants would be required to pay $ 10,000 per day for every day after March 3, 2000 that Defendants failed to comply with its order, and that the individual defendants and their counsel would be personally liable for $ 1,000 of the $ 10,000 daily amount.

Shortly thereafter, Plaintiffs filed a motion for a special order, and, in response, the tribal court issued a third order on March 6, 2000. That order required Defendants to take the following additional actions: refrain from alienating any money, property, or assets of any type until the relief granted in the preliminary injunction was satisfied; provide an accounting of all Defendants' assets to Plaintiffs; list Plaintiffs first in order of priority as secured creditors on Defendants' files with the County Recorder of San Juan County; and

provide Defendants' 1998 and 1999 tax returns to Plaintiffs. The court further explained that any disobedience of the order would result in the issuance of arrest warrants for Defendants, and it also granted Plaintiffs leave to seek enforcement of the court's orders in Utah or federal court.

Plaintiffs accepted the tribal court's invitation to seek enforcement of the orders and filed suit in federal district court on July 25, 2000. They sought both a declaratory judgment and a preliminary injunction enforcing the tribal court's orders. Less than two months later, Defendants filed a motion to dismiss Plaintiffs' declaratory judgment claims on grounds of sovereign immunity and Plaintiffs filed a cross-claim for summary judgment. The district court granted Defendants' motion to dismiss on October 30, 2000, reasoning that Defendants enjoyed sovereign immunity from suit in tribal court and that their sovereign immunity had not been waived vis-a-vis the Navajo Nation. For the same reason, the district court also denied Plaintiffs' request for a preliminary injunction and their cross-claim for summary judgment. Plaintiffs appealed from that order.

On appeal, we vacated the district court's order and remanded for further proceedings. n1 *See* MacArthur v. San Juan County, 309 F.3d 1216, 1228 (10th Cir. 2002) *(hereinafter MacArthur I)*. We held that the district court erred in deciding the sovereign immunity issue before first determining whether the Navajo Nation possessed adjudicative authority over the activities of Defendants, who are nearly all nonmembers of the Navajo Nation. *See* id. at 1227. We explained that sovereign immunity and tribal regulatory authority are

distinct legal doctrines and, pursuant to *Nevada v. Hicks*, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001), the adjudicative authority of tribal courts is a threshold question that must be answered before a court may consider the merits of the underlying action. See id. at 1226-27. We therefore directed the district court, on remand, to conduct an analysis of the Navajo Nation's adjudicative authority over Defendants pursuant to *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), *before reaching the separate issue of sovereign immunity*. *See* id. at 1227.

That is exactly what the district court did. In a published order dated October 12, 2005, the district court rendered judgment in Defendants' favor. In doing so, the district court held that the Navajo Nation possessed civil regulatory and adjudicatory authority over the claims of Mr. Riggs and Mr. Dickson arising out of their consensual employment relationships with SJHSD. *See* MacArthur v. San Juan County, 391 F. Supp. 2d 895, 1056 (D. Utah 2005) *(hereinafter MacArthur II)*. It also held that the Navajo Nation possessed adjudicatory authority over Mr. Riggs's defamation claim against Mr. Wood and all three Plaintiffs' employment-related claims against Mr. Atcitty, who is an enrolled member of the Navajo Nation. *See id.* The district court held that the Navajo Nation did not possess regulatory or adjudicatory authority over the activities of the remaining Defendants. *See id.* Despite the fact that the district court determined that the Navajo Nation possessed subject matter jurisdiction over some of Plaintiffs' claims, it nonetheless refused to issue an injunction or declaratory judgment to enforce the tribal court's orders as to those claims because the orders were non-

final and interlocutory in nature, most of the relief granted in the orders has since been rendered moot, Plaintiffs had not properly exhausted their claims, and most of the claims were barred by sovereign immunity. *See* id. at 1056-57.

Although deciphering Plaintiffs' arguments on appeal is an extremely difficult task, n2 they appear to argue that: (1) Defendants may not challenge the propriety of the Navajo district court's orders because they failed to exhaust their remedies in tribal court; (2) the Navajo district court's preliminary injunction is entitled to full faith and credit; (3) federal courts lack the authority to question whether the Navajo district court possessed subject matter jurisdiction and must enforce its preliminary injunction orders without independent review; (4) laws enacted, and policies followed, by Congress and the President subsequent to Montana nullified its framework for defining the inherent sovereignty of Indian tribes; and (5) sovereign immunity does not apply to shield Defendants from liability.

Discussion

I. Standard of Review

We review a district court's grant of summary judgment de novo, applying the same legal standard as below. *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1264 (10th Cir. 2007). Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

We also review a district court's dismissal for failure to state a claim de novo. *Lovell v. State Farm Mut. Auto Ins. Co.*, 466 F.3d 893, 898 (10th Cir. 2006). We may uphold the grant of a motion to dismiss if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69, 1974, 167 L. Ed. 2d 929 (2007) (explaining that the pleading standard by which courts look to whether the plaintiff can prove "no set of facts" giving rise to a claim "has earned its retirement"); *see also* The Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 2007 U.S. App. LEXIS 16204, 2007 WL 1969681, at *3 (2007).

II. Enforcement of the Navajo District Court's Preliminary Injunction Orders

While Plaintiffs have sought both a declaratory judgment and a preliminary injunction, their primary objective in this litigation is to enforce the Navajo district court's preliminary injunction orders granting them broad relief. The primary issue on appeal, therefore, is whether there is anything to prevent us from recognizing and enforcing those orders. But before we address that question head-on, there are a number of threshold issues to be resolved.

To begin, Plaintiffs argue that Defendants may not challenge the enforceability of the tribal court orders because they failed to exhaust available tribal court

remedies. "The Supreme Court . . . has required litigants to exhaust their tribal court remedies before a district court may evaluate the existence of a tribal court's jurisdiction." Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15-16, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)). Ordinarily, however, it is federal court plaintiffs, not defendants, who are required to exhaust. Also, Defendants no longer had tribal court remedies available to them once Plaintiffs sought enforcement in federal court. We think that he who defeats another's ability to exhaust cannot then assert failure to exhaust as a defense. Moreover, the remedy for a litigant's failure to exhaust is not enforcement of the tribal court's judgment, as Plaintiffs seek, it is a dismissal or abeyance of the action until exhaustion has occurred, see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)--neither of which Plaintiffs request. Finally, we possess all the facts necessary to conduct our jurisdictional inquiry and thus exhaustion would serve no purpose other than delay. See Burrell, 456 F.3d at 1168 (listing five exceptions to the exhaustion requirement).

Next, we must determine the proper mechanism by which we might enforce the Navajo district court's orders. Plaintiffs assert that the proper mechanism is the Full Faith and Credit Clause of the Constitution, see U.S. Const. art. IV, § 1, and the full faith and credit principles found within 28 U.S.C. § 1738. While the Constitution only requires that states grant full faith and credit to the judgments of sister states, § 1738 extends that requirement to the courts of the United States and its territories and possessions. See U.S.

Const. art. IV, § 1; 28 U.S.C. § 1738. As we noted in our prior decision in this case, the Supreme Court has broadcast mixed signals as to whether the tribes are to be considered territories or possessions of the United States and thus included within the language of § 1738. See MacArthur I, 309 F.3d at 1225. Moreover, "[t]his court has not yet decided whether a tribal court's judgment is entitled to preclusive effect under the Full Faith and Credit Clause or as a matter of comity." Burrell, 456 F.3d at 1176 (McConnell, J., concurring) (internal citations omitted); see also MacArthur I, 309 F.3d at 1225. Regardless, we need not resolve the issue because even if we were required to enforce tribal judgments as a matter of full faith and credit, only final judgments are subject to enforcement pursuant to full faith and credit principles, see Durfee v. Duke, 375 U.S. 106, 111, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963); Felix S. Cohen, Handbook of Federal Indian Law § 7.07[2][a], at 658 (2005 ed.) (hereinafter Handbook), and the preliminary injunction orders sought to be enforced in this case hardly constitute final judgments, see Sole v. Wyner, 127 S. Ct. 2188, 2195, 167 L. Ed. 2d 1069 (2007) ("At the preliminary injunction stage, the court is called upon to assess the probability of the plaintiff's ultimate success on the merits."); Keirnan v. Utah Transit Auth., 339 F.3d 1217, 1220 (10th Cir. 2003) ("A preliminary injunction serves to preserve the status quo pending a final determination of the case on the merits."). n3 Therefore, if we are to enforce the preliminary injunction orders, it must be as a matter of comity.

Plaintiffs also argue that we have no power to do anything other than enforce the Navajo district court's orders. In other words, once the tribal court issued its preliminary injunction orders and Plaintiffs arrived at

federal court to enforce them, the jurisdiction of the federal courts is limited to enforcement, which is mandatory on our part. This argument misunderstandsfederal court jurisdiction and the discretion we possess under the doctrine of comity. The question of the regulatory and adjudicatory authority of the tribes--a question bound up in the decision to enforce a tribal court order--is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331. n4 See Nat'l Farmers Union, 471 U.S. at 852; Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997). Additionally, we proceed cautiously and carefully when called upon to enforce foreign judgments. While there is no doubt that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978), the decision whether to enforce non-final orders of a tribal court is left primarily to our discretion under the doctrine of comity, see Burrell, 456 F.3d at 1168, 1171; Wilson, 127 F.3d at 810 ("[C]omity . . . affords the best general analytical framework for recognizing tribal judgments.").

The basic dilemma the doctrine of comity is meant to solve is that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority derived." Hilton v. Guyot, 159 U.S. 113, 163, 16 S. Ct. 139, 40 L. Ed. 95 (1895). Thus, comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or

of other persons who are under the protection of its laws." n5 Id. at 164. Comity is not an inexorable command, see id., and a request for recognition of a foreign judgment may be rebuffed on any number of grounds, *see* Wilson, 127 F.3d at 810; *Handbook* § 7.07[2][a], at 658 ("In contrast to the full faith and credit rule, the comity doctrine allows the receiving court greater discretion to determine whether to enforce the foreign judgment.").

Although recognition and enforcement of tribal court judgments as a matter of comity also lies within our discretion, "[t]he importance of tribal courts and the dignity we accord their decisions will weigh in favor of comity." *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1142 (9th Cir. 2001). Nonetheless, recognition of a tribal court judgment *must* be refused where one of two circumstances exist. First, comity must not be granted where the tribal court lacked either personal or subject matter jurisdiction. *Burrell*, 456 F.3d at 1171. Second, a tribal court judgment must not be enforced where the party against whom enforcement was sought was not afforded due process of law. *Id.* Apart from those two mandatory grounds on which to refuse enforcement, there are several grounds on which a court may exercise its discretion to refuse enforcement of a tribal judgment. *See* Wilson, 127 F.3d at 810 *(listing several possible discretionary reasons for the non-enforcement of tribal judgments).*

In this case, we must refrain from enforcing much of the Navajo district court's orders because that court lacked subject matter jurisdiction (i.e. adjudicatory authority) over nearly all of Defendants' activities. Additionally, under the unique circumstances of this

case, we will exercise our discretion to similarly refuse to enforce the tribal court judgment even as to those claims over which the tribal court arguably had subject matter jurisdiction (those asserted against Mr. Atcitty).

A. *Tribal Court Subject Matter Jurisdiction - The Analytical Framework*

"Originally the Indian Tribes were separate nations within what is now the United States." *Williams v. Lee*, 358 U.S. 217, 218, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). As separate nations, they enjoyed the same degree of sovereignty as that enjoyed by all other sovereign nations the world over. Through their original incorporation into the United States as well as through specific treaties and statutes, however, they have lost several important aspects of their inherent sovereignty. *Id.* As to which aspects of inherent sovereignty have been retained and which have been divested, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *United States v. Wheeler*, 435 U.S. 313, 326, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). But the Indian tribes' status as dependent nations has not divested them of "the powers of self-government." *See id.*

Despite the fact that the Navajo Nation retains control over its self-government, "[i]t is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian Tribes, remains subject to ultimate federal control." Id. at 327. This is because "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court has]

consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). Congress's "plenary and exclusive" powers in respect to the tribes derive from the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3), treaties entered into by the Executive Branch, and preconstitutional powers necessarily inherent in any federal government. *See* id. at 200-01. *The upshot of Congress's plenary power over the tribes is that it may "enact legislation that both restricts, and in turn, relaxes . . . restrictions on tribal sovereign authority."* *Id.* at 202.

In the absence of congressional legislation, however, tribal governments retain regulatory authority over all matters falling within their inherent sovereignty. In *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), the Supreme Court laid down a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. There are, nevertheless, two narrow exceptions to the general rule against tribal authority over nonmembers. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Although *Montana* dealt exclusively with the tribes' regulatory authority over non-Indians, *see* Strate v. A-1 Contrs., 520 U.S. 438, 453, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) ("*Montana* immediately involved regulatory authority . . . ."), the Supreme Court has since announced that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id.* It has also since explained that it has left "open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction." *Nevada v. Hicks*, 533 U.S. 353, 358, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001). Thus, our analysis must proceed as follows: initially, we must determine whether each party's status is such that *Montana*'s general rule against regulatory authority over nonmembers is implicated; in other words, we must determine whether the party over whom the tribe is seeking to assert regulatory authority is a nonmember of the Navajo Nation. If the party in question is a nonmember, then we must decide whether either of the two exceptions identified in *Montana* applies. If one of the two *Montana* exceptions applies and the tribe therefore possesses regulatory authority over the nonmember, we must determine whether the nonmember's activities also fall within the Tribe's adjudicative authority.

Before conducting this analysis, we must resolve two matters. First, there does not appear to be, and Plaintiffs have not identified any, congressional legislation expressly authorizing the Navajo Nation to exercise regulatory authority over Defendants in this case. Stated slightly differently, Congress has passed no law which permits the Navajo Nation to exercise regulatory authority over nonmember entities or

individuals who employ members of the tribe within the confines of the reservation; nor has it passed a broader statute which arguably encompasses nonmember employers. Consequently, any regulatory authority the Navajo Nation might possess is strictly a byproduct of its retained inherent sovereignty.

Second, Plaintiffs contend that laws and/or policies enacted by Congress and the Executive Branch subsequent to *Montana* nullified its framework for defining the inherent sovereignty of Indian tribes. This argument is unavailing. Many of the sources on which Plaintiffs rely predate *Montana* and thus cannot serve as the basis for overturning that decision. We have, nonetheless, reviewed each policy, statute, treaty, and contract relied upon by Plaintiffs and can find no indication whatsoever that *Montana* has been altered in any way. n6 Finally, as recently as 2001, the Supreme Court applied the *Montana* framework in determining whether the Navajo Nation possessed regulatory authority over nonmembers of the tribe, *see* Hicks, 533 U.S. at 358-65--*a strong indication that the Montana* framework remains alive and well. Consequently, we will proceed to apply the *Montana* framework.

B. *Whether Montana's General Rule Applies*

As previously stated, *Montana* only applies insofar as the tribe in question is seeking to assert regulatory authority over the activities of a nonmember. *See* 450 U.S. at 565-66. For a long while, however, *Montana*'s applicability seemed to hinge not only on the status of the party over whom authority was exercised but also on the character of the property on which the regulated activities occurred. This stemmed from the fact that "in

Montana, as in later cases following *Montana*'s instruction . . . the challenged tribal authority related to nonmember activity on alienated, non-Indian reservation land." *Strate*, 520 U.S. at 454. Litigants began noticing this common denominator, and in *Strate* the tribal petitioners argued that *Montana* was inapplicable because the land on which the regulated activity--an auto accident--occurred was not traditional non-Indian fee land due to the fact that, like here, it was held in trust for the tribe and its members. *See id.* Justice Ginsburg, writing for the Court, acknowledged "that tribes retain considerable control over nonmember conduct on tribal land," but held that the nature of the land in question was more akin to alienated, non-Indian land because the Tribe could not "assert a landowner's right to occupy and exclude." *See* id. at 454-56. *Thus, Montana* applied.

The notion that *Montana*'s applicability turns, in part, on whether the regulated activity took place on non-Indian land was finally put to rest in *Hicks*. In that case, the Navajo Nation attempted to assert regulatory authority over nonmembers' activities unquestionably occurring on Indian land. *See* Hicks, 533 U.S. at 359. *Because the activities occurred on Indian land, Hicks argued that Montana* had no relevance. In rejecting that argument, the Court explained that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)--the case upon which *Montana* primarily relied in defining the scope of the tribes' inherent sovereign powers--drew no distinction between Indian and non-Indian land. *See* Hicks, 533 U.S. at 359. *It also noted that language from Montana* itself clearly implied that the general rule announced in that case applies to Indian and non-Indian land alike.

See id. at 359-60. Thus, while the nature of the property is a factor--and possibly a dispositive one--to consider in determining whether the regulated activity falls within either of Montana's two exceptions, see id. at 360, the only relevant characteristic for purposes of determining Montana's applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority, *see* id. at 388 *(O'Connor, J., concurring in part) ("[T]he majority is quite right that Montana* should govern our analysis of a tribe's civil jurisdiction over nonmembers both on and off tribal land.").

Montana's presumption against tribal civil jurisdiction over nonmembers applies nearly across the board in this case because, with the exception of Mr. Atcitty, Defendants are all nonmembers of the Navajo Nation. n7 Mr. Atcitty, who was a member of SJHSD's Board of Trustees, is an enrolled member of the Navajo Nation and resides within the borders of the Navajo reservation. As a result, while it is unclear whether the Navajo Nation possessed civil jurisdiction over Mr. Atcitty's activities, given that they were undertaken exclusively in his capacity as a state official, *cf.* id. at 362 *("When . . . state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribe land . . . "), it is clear that he does not fall within the ambit of Montana.* We, therefore, proceed to apply *Montana* to all Defendants except Mr. Atcitty.

B. *Application of Montana*

The starting point under *Montana* is, of course, with the general rule "that the inherent sovereign powers of

an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. The general rule remains in effect unless a nonmember enters into a consensual relationship with the tribe or its members, or the activities of a nonmember threaten the tribe's right to self-government. *Id.* at 565-66. Because all Defendants, with the lone exception of Mr. Atcitty, are nonmembers, one of these two exceptions must apply in order for the Navajo Nation to assert regulatory authority over their actions.

1. *Ms. Singer*

Ms. Singer's status as a nonmember of the Navajo Nation renders application of the two *Montana* exceptions exceedingly straightforward in her case. There is no indication, and Plaintiffs do not contend, that any of the Defendants in this case entered into a consensual relationship with the Navajo Nation itself, and accordingly we are only concerned here with consensual relationships between Defendants and the tribe's members. Because she is a nonmember, however, there is no possibility that Defendants' actions with respect to Ms. Singer could have resulted in a consensual relationship with a member of the Navajo Nation. Moreover, Defendants' employment-related activities in regard to another nonmember on non-Indian land in no way affects the Navajo Nation's right to govern itself. Thus, neither *Montana* exception applies and the Navajo Nation did not possess regulatory authority over Defendants' activities vis-a-vis Ms. Singer.

2. *Mr. Riggs and Mr. Dickson*

The fact that Mr. Riggs and Mr. Dickson are enrolled members of the Navajo Nation renders application of the *Montana* exceptions more complicated than in Ms. Singer's case.

a.*The Consensual Relationship Exception*

Our first task is to determine whether any of the Defendants entered into a consensual relationship with Mr. Riggs or Mr. Dickson "through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565. The district court below held that SJHSD had entered into such a relationship with Mr. Riggs and Mr. Dickson via its employment relationship with them. *See* MacArthur II, 391 F. Supp. 2d at 1011-12. Plaintiffs do not appear to argue that a consensual relationship was formed in any other manner.

There is no doubt that an employment relationship between two parties is contractual in nature. See, e.g., *Perry v. Woodward*, 199 F.3d 1126, 1133 (10th Cir. 1999) ("[T]he employment-at-will relationship encompasses sufficient contractual rights to support section 1981 claims for wrongful termination."); *Rackley v. Fairview Care Ctrs., Inc.*, 2001 UT 32, 23 P.3d 1022, 1026 (Utah 2001) ("[A]n employment relationship entered into for an indefinite period of time is presumed to be at-will and gives rise to a contractual arrangement . . . .") In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at-will. *See* Haddle v. Garrison, 525 U.S. 121, 126, 119 S. Ct. 489, 142 L. Ed. 2d 502 (1998) ("The kind of interference with at-will employment relations alleged here is merely a species of the traditional torts

of intentional interference with contractual relations and intentional interference with prospective contractual relations."). Consequently, Montana's consensual relationship exception applies to a nonmember who enters into an employment relationship with a member of the tribe.

But not just any consensual employment relationship will do. Rather, Supreme Court precedent clearly limits the regulatory authority of tribes--at least that which is derived solely from their inherent sovereignty--to the reservation's borders. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 653, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) *("An Indian tribe's sovereign power to tax--whatever its derivation--reaches no further than tribal land."); Strate*, 520 U.S. at 446 *("Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land *within a reservation*, subject to two exceptions . . . .") (emphasis added); *Montana*, 450 U.S. at 565 ("To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations* . . . .") (emphasis added). The notion that inherent sovereignty ceases at the reservation's borders is consistent with the Court's statement in *Wheeler* that "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 326. It would simply strain credulity to hold that the Navajo Nation may exercise regulatory authority over any employer in the United States so long as the individual or entity employs an enrolled member of the tribe. Therefore, we

hold that a tribe only attains regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation.

Applying the foregoing principles to this case, the only Defendant arguably falling within the consensual relationship exception is SJHSD itself. SJHSD entered into contractual employment relationships with Mr. Riggs and Mr. Dickson, and they were employed at the Clinic within the exterior boundaries of the Navajo reservation. Mr. Riggs and Mr. Dickson did not enter into a contractual employment relationship with any other Defendant. While some of the Defendants admittedly played a tangential role in SJHSD's employment relationships with the two, none of the Defendants, other than SJHSD, entered into the type of consensual relationship with Mr. Riggs or Mr. Dickson sufficient to fall within the exception. In other words, it is self-evident that none of them entered into "commercial dealing, contracts, [or] leases" with either Mr. Riggs or Mr. Dickson. And being one's coworker or superior standing alone cannot possibly constitute the type of "other arrangements" the Supreme Court had in mind in *Montana*. If those relationships were sufficient, "the exception would swallow the rule." *Atkinson Trading Co.*, 532 U.S. at 655.

Apart from finding that SJHSD fell within the consensual relationship exception, the district court also held that Reid Wood was subject to the regulatory authority of the Navajo Nation at least insofar as Mr. Riggs's defamation claim was concerned. n8 *See*

MacArthur II, 391 F. Supp. 2d at 1014. The district court came to this conclusion because Mr. Wood "was a central character in the events . . . that form the factual basis for plaintiffs['] . . . employment-related claims," and because the Navajo district court did not clearly err in finding that Mr. Wood's characterization of Mr. Riggs's time card errors as fraudulent may make out an actionable defamation claim. *See id.* The primary fault with the district court's holding lies in the lack of a "central character" exception to the general presumption against the exercise of tribal regulatory authority over nonmembers. Moreover, hanging regulatory authority on the fact that Mr. Wood's statements may constitute actionable defamation places the cart before the horse. That a cause of action may successfully be asserted against Mr. Wood says nothing about the Tribe's ability to regulate Mr. Wood's activities in the first place. Without civil jurisdiction the cause of action is null and void, regardless of whether it might result in a successful judgment if there was jurisdiction. Properly applying *Montana*, it is clear that Mr. Wood did not enter into the type of consensual relationship required for the Navajo Nation to obtain regulatory authority over him--only SJHSD, as the employer of Mr. Riggs and Mr. Dickson, arguably did.

Although at first blush it appears that SJHSD's consensual employment relationships with Mr. Riggs and Mr. Dickson fall within *Montana*'s consensual relationship exception, this case is unique in that the consensual relationship at issue involves a political subdivision of the State of Utah, and it was entered into pursuant to an exercise of the police power on non-Indian land. Relying upon *Hicks*, SJHSD contends its status as a state entity removes it from *Montana*'s first

exception. In *Hicks*, Justice Scalia, writing for the majority, stated in a footnote that, "Read in context, an 'other arrangement' is clearly another *private consensual* relationship, from which the official actions in this case are far removed." 533 U.S. at 359 n.3. SJHSD seizes upon this statement and argues that an employment relationship between a member of a tribe and a governmental entity on non-Indian land (even within the exterior boundaries of the reservation) cannot meet *Montana*'s first exception, even if a similar private employment relationship would.

SJHSD's argument finds strong support in *Hicks*. In her concurrence in that case, Justice O'Connor read the majority opinion as disavowing civil jurisdiction based on non-private consensual relationships. She further expressed reservation that the Court's disavowment created a per se rule that consensual relationships entered into between state governments and tribes, "such as contracts for services or shared authority over public resources," could no longer give rise to tribal civil jurisdiction. *See* id. at 393-94 *(O'Connor, J., concurring)*. Justice Scalia responded in kind with the following:

The [Montana] Court . . . obviously did not have in mind States or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into. This is confirmed by the fact that all four of the cases in the immediately following citation involved private commercial actors. *See* Confederated Tribes, 447 U.S. 131, at 152 (nonmember purchasers of cigarettes from

tribal outlet); *Williams v. Lee*, 358 U.S., at 217 (general store on the Navajo reservation); *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030 (1904) (ranchers grazing livestock and horses on Indian lands "under contracts with individual members of said tribes"); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (challenge to the "permit tax" charged by a tribe to nonmembers for "the privilege . . . of trading within the borders"). *Id.* at 372.

Justice Scalia is not the only one to have observed that the cases relied upon in support of *Montana*'s consensual relationship exception dealt exclusively with private conduct. Three years prior to *Hicks*, the Ninth Circuit observed that all of the cases cited to support *Montana*'s first exception "involve either direct regulation by a tribe of non-Indian activity on the reservation or lawsuits between a private party and the tribe or tribal members arising from an on-reservation transaction or agreement." *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (en banc). As a result of that observation, the en banc court held that an agreement between the State of Idaho and the Nez Perce Tribe did not qualify as a consensual relationship of the type giving rise to tribal regulatory authority. *See id.*

We too adhere to the distinction between private individuals or entities who voluntarily submit themselves to tribal jurisdiction and "States or state officers acting in their governmental capacity." The power to exercise regulatory authority over another independent sovereign on that sovereign's land, even where a consensual relationship is involved, closely resembles the "freedom independently to determine

their external relations," which the tribes necessarily relinquished as a result of their dependent status. *See* Wheeler, 435 U.S. at 326. Thus, we hold, in the absence of congressional delegation, the tribes may not regulate a State qua State on non-Indian land n9 (even within the exterior boundaries of the reservation) based only on a consensual relationship between members of the tribe and the State. n10

In the instant case, the employment relationships at issue involved two members of the Navajo Nation and SJHSD, a political subdivision of the State of Utah. SJHSD is strictly a creature of Utah law, see Utah Code Ann. § 17A-2-1304 (1999), and nearly all of its board members were state employees. The employment relationships at issue were entered into exclusively in SJHSD's governmental capacity, and those relationships were part and parcel of SJHSD's duty to provide medical services to residents of San Juan County. *See* Pueblo Aircraft Serv., Inc. v. City of Pueblo, 679 F.2d 805, 810 (10th Cir. 1982) *("In its 'governmental capacity' a municipality acts as an arm of the state for the public good on behalf of the state rather than itself."). The provision of medical services is unquestionably an exercise of the police power. See* Hill v. Colorado, 530 U.S. 703, 715, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) *("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens.") (internal quotations omitted); see also* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (explaining that a mandated-benefit law was a "valid and unexceptional exercise of the . . . police power" where "[i]t was designed in part to ensure that . . . less wealthy [Massachusetts] residents . . . would be provided

adequate mental-health treatment should they require it"). Accordingly, the employment relationships between SJHSD and Mr. Riggs and Mr. Dickson were not "private consensual relationships" in any sense of the term and do not fall within the first Montana exception.

b. *The Right to Self-Government Exception*

This brings us to *Montana*'s second exception. Again, the exception requires that "the conduct of non-Indians on fee lands within [the] reservation . . . has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. When viewed in isolation, the exception appears broad in scope. The Supreme Court has cautioned, however, that:

Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S., at 564. Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S., at 220. The *Montana* rule, therefore, and not its exceptions, applies to this case. *Strate*, 520 U.S. at 459 (alterations in original). In framing the second exception, the Court also later

added: "Tribal assertion of regulatory authority over nonmembers must be connected to th[e] right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361.

The proper question in this case, then, is whether regulatory authority over Defendants' activities, with the exception of those of Mr. Atcitty, is needed to preserve the Navajo Nation's right to make their own laws and be governed by them. In regard to the County defendants, the district court accurately noted that the Navajo district court "did not find facts showing conduct on the part of any County defendant that threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the Navajo Nation." *MacArthur II*, 391 F. Supp. 2d at 1007. The Navajo district court did not find (and neither do we) that the County defendants--including San Juan County, the San Juan County Commissioners, County Attorney Halls, and County Administrator Bailey--had any role in the complained of activities, other than that they exercised some control over, and provided advice to, SJHSD. Additionally, Mr. Bailey had some role in Plaintiffs' grievance process--he sent grievance decision letters and served as the grievance hearing officer. All of these actions, however, relate exclusively to the governance of SJHSD; they in no way impact the Navajo Nation's ability to make its own laws and be governed by them.

SJHSD's activities also do not affect the Navajo Nation's right to self-government. Despite Plaintiffs' attempts to make more of it, this case essentially boils down to an employment dispute between SJHSD and three of its former employees, two of whom happen to

be enrolled members of the Navajo Nation. While the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them. This is particularly evident here, when only two members of the Nation were involved and the employment relationships at issue were carried out on non-Indian land. The right at issue in this case is the Navajo Nation's claimed right to make its own laws and have *others* be governed by them, not the right to self-government.

We are therefore left with Ms. Lauren Schafer (SJHSD Personnel Director of Nursing), members of SJHSD's board, and Mr. Wood. Plaintiffs' only complaint about Ms. Schafer is that she failed to do enough to help them in their conflict with SJHSD and Mr. Wood. Moreover, in its orders, the Navajo district court stated only that Ms. Schafer wrote a letter critical of Ms. Singer and that she testified she had discovered only one piece of evidence as to Ms. Singer's intent to commit time card fraud. Failing to help others may violate the "golden rule," but it in no way constitutes an affront to the Navajo Nation's self-governance; and Ms. Schafer's actions vis-a-vis Ms. Singer are irrelevant due to Ms. Singer's lack of membership in the tribe. Next, because the Navajo district court's orders make no mention of the individual members of SJHSD's board and Plaintiffs make no attempt to explain how their activities pose a threat to the tribe's right to make its own laws, it follows that the individual members of the board fall squarely within *Montana*'s general rule. Finally, as previously detailed, the federal district court held that

the Navajo Nation possessed authority over Mr. Wood's alleged defaming of Mr. Riggs. To be sure, that alleged defamation may have had a negative impact on Mr. Riggs individually, but based on the record before us we fail to see how it, or any other of Mr. Wood's actions, negatively affected the tribe as a whole or its ability to self-govern.

In sum, with the arguable exception of Mr. Atcitty, the Navajo Nation did not possess regulatory authority over any of Defendants' activities. Because there exists no adjudicatory authority in the absence of regulatory authority, *Strate*, 520 U.S. at 453 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."), the Navajo district court did not possess jurisdiction over Plaintiffs' claims unrelated to the activities of Mr. Atcitty.

A. *Discretionary Enforcement With Respect to Mr. Atcitty*

Although the Navajo district court arguably possessed regulatory authority over Mr. Atcitty as a member of the Navajo Nation, as previously emphasized, the decision whether to enforce the tribal court orders in regard to Mr. Atcitty lies entirely within our discretion. Under the limited circumstances of this case, we choose not to enforce the tribal court orders in this respect. n11 Several considerations guide our decision.

First, as the district court observed, Utah Navajo Health Systems's assumption of control over the operations of the Clinic and Plaintiffs' employment there mooted much, though not all, of the relief afforded in the preliminary injunction orders. Also, while we are

not required to refrain from enforcing interlocutory foreign judgments, *see* Remington Rand Corp. v. Bus. Sys. Inc., 830 F.2d 1260, 1266 (3d Cir. 1987) ("[J]udicial acts need not always be final judgments to be granted comity.") (citing In re Colorado Corp., 531 F.2d 463, 469 (10th Cir. 1976)); Restatement (Second) Conflict of Laws § 92 and cmt. c, § 98 (1971), the amorphous and incomplete nature of the orders at issue renders them nearly incapable of enforcement. Much of the relief that is not now moot has not been reduced to a sum certain; consequently, determining what portions of the orders are amenable to enforcement would be impracticable.

Third, despite the fact that Mr. Atcitty's status as an enrolled member of the Navajo Nation arguably imbued the Navajo district court with civil jurisdiction, the activities for which he was sued have little or nothing to do with his status as an enrolled member of the tribe. Normally the lack of a nexus between tribal membership and the claims at issue will not necessarily pose an impediment to enforcement, but here the lawsuit against Mr. Atcitty stems completely from his status as a government employee of the State of Utah. Thus, the same considerations which lead us to conclude that the tribes do not possess jurisdiction over States qua States on state land lead us to conclude that enforcement against Mr. Atcitty should be refused.

Finally, it appears that Mr. Atcitty played an extremely minor role in the incidents at issue. His role was confined to membership on SJHSD's board, and he is not even mentioned by name in any of the preliminary injunction orders. Thus, it would be inequitable to enforce the Navajo district court's extremely broad orders against him alone. n12

In sum, we REVERSE the federal district court

insofar as it issued a declaratory judgment that the Navajo Nation possessed civil jurisdiction over the employment-related claims of Mr. Riggs and Mr. Singer against SJHSD. We also REVERSE the district court insofar as it issued a declaratory judgment that the Navajo Nation possessed civil jurisdiction over Mr. Riggs's defamation claim against Reid Wood. We VACATE the district court's issuance of a declaratory judgment that the Navajo Nation possessed civil jurisdiction over Plaintiffs' claims against Roger Atcitty. Finally, we AFFIRM the district court's judgment refusing to enforce the Navajo district court's orders.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

1In a separate order, the district court dismissed Plaintiffs' claims against Truck Insurance and R. Dennis Ickes on grounds that the Navajo Nation did not possess regulatory authority over their activities. We affirmed that decision on appeal. See MacArthur I, 309 F.3d at 1222-25. Plaintiffs dedicate significant portions of their brief on appeal arguing why those claims should not have been dismissed. Under the law of the case doctrine, however, we are not free to reconsider the district court's dismissal of those claims or the prior panel's subsequent affirmance of that decision. See Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 823 (10th Cir. 2007).

2We note that Plaintiffs' briefing in this case has in common many of the problems identified with regard to the briefing in appeal 05-4317. Nonetheless, we reach the merits because we are able to sufficiently decipher Plaintiffs' arguments, and those arguments are non-frivolous enough to warrant full review and response.

3Although the orders at issue did award attorney's fees, back-pay, and other monetary awards, the amount of those awards was never reduced to a sum certain and thus the orders are not final with respect to those awards. See Harbert v. Healthcare Servs. Group, 391 F.3d 1140, 1145 (10th Cir. 2004) ("[A]n order that determines liability but leaves damages to be calculated is not final.").

4In this case, Plaintiffs argue that federal law has not divested the Navajo Nation of its civil jurisdiction over Defendants' activities--in fact, they allege federal law has granted it such jurisdiction and seek a declaratory judgment saying as much. As a result, we agree with the district court's observation that "the action . . . is one arising under federal law because it turns on substantial questions of federal law." MacArthur II, 391 F. Supp. 2d at 987-88 (internal quotations and modifications omitted); see also Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986) ("[I]n cases encompassing the federal question whether a tribal court has exceeded its lawful limits of jurisdiction involving an exercise of civil subject-matter jurisdiction . . . the federal district court is empowered to review a tribal court decision under 28 U.S.C. § 1331."); Wilson v. Marchington, 934 F. Supp. 1176, 1178 (D. Mont. 1995), reversed on other grounds at 127 F.3d 805 (9th Cir. 1997). This is especially true considering the prior panel's holding that the Montana analysis is a threshold issue. See MacArthur I, 309 F.3d at 1226-27.

5Under Utah law, foreign judgments not entitled to full faith and credit may only be enforced under the doctrine of comity. *See* Mori v. Mori, 931 P.2d 854, 856 (Utah 1997) *(citing Hilton)*.

6At oral argument, and in a motion for summary disposition filed since, Plaintiffs primarily relied upon a Bureau of Indian Affairs contract with the Navajo Nation in arguing that the jurisdiction of the Navajo courts has been expanded and *Montana* no longer controls. We have carefully reviewed the copy of that contract provided by Plaintiffs, *see* Aplt. App. at 178-92, and find no mention of *Montana*, the inherent sovereignty of the Navajo Nation, or the jurisdiction of its courts, and thus Plaintiffs' reliance on that contract is misguided.

7Even assuming the rule laid down in *Strate* were still operable, *Montana* would nevertheless apply because Plaintiffs have made no showing that the Navajo Nation could "assert a landowner's right to occupy and exclude" others from the trust land on which the Clinic sits. *See* 520 U.S. at 456.

8Both SJHSD and Mr. Wood have cross-appealed the district court's judgment holding that the Navajo Nation possessed regulatory authority over each of them.

9When we use the term "non-Indian land," we use it in the sense that the Supreme Court does: The land involved is non-Indian fee land or akin to non-Indian fee land in that the tribe may not "assert a landowner's right to occupy and exclude" others from the land. *See* Strate, 520 U.S. at 456.*10*

As a result of our limited holding, we need not decide whether Montana's first exception encompasses consensual agreements between tribal members and governmental entities acting in a proprietary, rather

than a governmental, capacity. We also express no opinion regarding the ability of the tribes to exercise regulatory authority over States qua States when the regulated activity occurs on Indian land.

11As a result of our refusal to enforce the Navajo district court's orders on other grounds, the portion of Mr. Atcitty's cross-appeal arguing that the Navajo Nation did not possess regulatory authority over him is moot. Nonetheless, we vacate that portion of the federal district court's decision issuing a declaratory judgment that the Navajo district court possessed jurisdiction over Mr. Atcitty.

12Because we decide the case on alternative grounds, we need not address the parties' arguments regarding Defendants' sovereign immunity.

Civil No. 2:00-CV-584J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, et al., Plaintiffs, vs. SAN JUAN COUNTY, et al., Defendants; DONNA SINGER, FRED RIGGS, and ALLISON DICKSON, Plaintiffs, vs. SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, RICHARD BAILEY, REID WOOD, ROGER ATCITTY, JOHN LEWIS, KAREN ADAMS, PATSY SHUMWAY, and LAUREN SCHAFER, Defendants.

October 12, 2005, Decided
October 12, 2005, Filed

PRIOR HISTORY: |**1| Case 2:00-cv-00584-BSJ. *MacArthur v. San Juan County, 416 F. Supp. 2d 1098, 2005 U.S. Dist. LEXIS 43695 (D. Utah, 2005)*

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JUDGES: BRUCE S. JENKINS, United States Senior District Judge.

OPINION BY: BRUCE S. JENKINS

OPINION

MEMORANDUM OPINION & ORDER

***

The original complaint filed in this action asserted claims by fifteen plaintiffs, including Donna Singer, Fred Riggs, and Allison Dickson. [1] (*See* Complaint (Verified), filed July 25, 2000 (dkt. no 1).) These three plaintiffs' claims were addressed early in this litigation by Judge Kimball, the district judge then assigned to this case, who entered orders dismissing their claims against San Juan County, the San Juan Health Services District and various individual defendants on the grounds that neither the County nor the Health District had waived their sovereign immunity from suit in tribal court, and that individual employee defendants likewise remained immune from suit under Utah law absent allegations of fraud or malice. The court

dismissed their claims against Truck Insurance and R. Dennis Ickes on the ground that the tribal court lacked subject matter jurisdiction. (*See* Memorandum Decision and Order, filed October 30, 2000 (dkt. no. 81); Memorandum Decision and Order, filed December 13, 2000 (dkt. no. 115).) Those rulings became the subject of a *Rule 54(b)* certification and an appeal. (*See* Notice of Appeal, filed January 4, 2001 (dkt. no. 126); Order, filed March 6, 2001 (dkt. [**6] no. 168).) On October 7, 2002, The court of appeals affirmed the dismissal of Truck Insurance and Ickes on jurisdictional grounds, but vacated the dismissal of the County and Health District defendants and remanded the matter for [*902] further proceedings. *See MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002).* By that time, the case had already been reassigned to this court.

One month later, in November of 2002, the plaintiffs sought leave to file an amended complaint that, among other things, would clarify the claims of Singer, Riggs and Dickson in light of the appellate court opinion. Leave to amend having since been granted, the claims of these three plaintiffs are now set forth [**7] in Part II of the Amended Complaint. (*See* Amended Complaint, filed June 14, 2005 *nunc pro tunc* to November 14, 2002 (dkt. no. 744) ("Amended Complaint"), at 98-120.)

I. THE ISSUES ON REMAND

The Tenth Circuit vacated the court's dismissal of Singer, Riggs and Dickson's claims against County and Health District defendants, and remanded the matter for further proceedings consistent with its opinion that "the district court should have performed a *Montana* analysis before reaching the sovereign immunity

question," referring to *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). MacArthur v. San Juan County, 309 F.3d at 1227, 1228.*

> The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Id. at 1226.

On remand, then, this court must first determine [**8] whether the Navajo Nation District Court had subject-matter jurisdiction over the parties and claims in *Donna Singer, et al. vs. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation Dist. Ct., filed April 12, 1999), the proceeding in which the orders now at issue were originally entered. To make that determination, this court has examined (1) the nature and scope of Navajo sovereignty; (2) the tribal forum's relationship to the parties and the subject matter of the claims, including the nature of the interests and injuries asserted by these plaintiffs, and whether the scope of the protection of Navajo law extends to embrace those interests and injuries; and (3) the extent of the jurisdiction of the Navajo courts to adjudicate, plaintiffs' pleaded claims against the County and Health

District defendants and grant the relief reflected in the three orders now at issue.

Should plaintiffs' claims fall within the subject matter jurisdiction of the Navajo court, this court must decide whether the Navajo court's adjudication of those claims was barred by sovereign immunity--as asserted by the County and Health District defendants and previously held by this court--or whether [**9] the plaintiffs are entitled to enforcement of the Navajo court orders through further proceedings in this court, applying either principles of comity or full faith and credit.

II. PRECIS

For reasons explained in some detail below, this court holds that the Navajo Nation District Court had subject-matter jurisdiction of plaintiffs Riggs and Dickson's claims against the San Juan Health Services District, and Riggs' defamation claim against one individual defendant, Reid Wood, arising from Riggs and Dickson's employment at the Montezuma Creek Clinic, a facility located on state-owned land within the boundaries of the Navajo Reservation: both Riggs and Dickson are Navajo tribal members living on the Navajo Reservation, and (1) their employment [*903] by the District was a "consensual relationship with the tribe or its members" entered into "through . . . contracts, . . . or other arrangements," and (2) employer conduct in such employment relationships "has some direct effect on . . . the economic security, or the health or welfare of the tribe," all within the meaning of *Montana v. United States, 450 U.S. 544, 565-566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, the controlling Supreme Court precedent vindicating [**10] the

exercise of Navajo civil jurisdiction over non-Indians under either of those circumstances. The Navajo court also had exclusive subject-matter jurisdiction of the claims of Riggs, Dickson and Singer against defendant Roger Atcitty, a Navajo tribal member residing on the reservation who had served as a member of the Health District's governing board, under *Navajo Nation Code*, tit. 7, § 253(B).

This court holds that the Navajo court did not have subject-matter jurisdiction of Riggs and Dickson's claims against San Juan County and the named non-Indian individual defendants (other than defendants Wood and Atcitty) under *Montana* or the *Navajo Nation Code*. Under controlling Supreme Court precedent, the Navajo court also did not have subject-matter jurisdiction of the claims of plaintiff Singer, a non-Indian living outside of the Navajo Reservation who is married to a Navajo tribal member, as against San Juan County, the Health District, or the non-Indian individual defendants arising from her employment as manager of the same clinic.

Excepting Riggs' defamation claim pleaded against Wood individually, adjudication in the Navajo court of Riggs and Dickson's cognizable claims [**11] against the San Juan Health Services District, Atcitty and Wood (and Singer's claim against Atcitty) is barred by the District's sovereign immunity under the limited-waiver, exclusive-remedy and exclusive-forum provisions of the Utah Governmental Immunity Act. The Act's limited waiver of immunity does not give the State of Utah's consent to suit against its political subdivisions in Indian tribal courts.

Sovereign immunity aside, the plaintiffs have asked this court to enforce three interlocutory orders "as issued" by the Navajo court granting preliminary injunctive and other equitable relief against the Health District and defendant Wood as a matter of full faith and credit, or under principles of comity. Yet much of that injunctive relief was rendered moot even before this action was filed in July of 2000; the portion of the equitable relief prescribed by those orders that is not moot still remains interlocutory and unliquidated as to sums ordered to be paid. For these reasons, the three Navajo court orders at issue need not be recognized or enforced in this forum at this time.

III. PROCEDURAL HISTORY

Following receipt of the Tenth Circuit's mandate in this case on November 20, 2002 (dkt. [**12] no. 460), this court set a schedule for consideration of the issues on remand. (*See* Minute Entry, dated January 7, 2003 (dkt. no. 480).) Those issues were briefed by counsel for the parties. (*See* "Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492); [2] San Juan Health District Defendants' Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss [*904] or for Summary Judgment, filed February 20, 2003 (dkt. no. 497); San Juan County Defendants' Memorandum Regarding Tribal Court Jurisdiction, filed February 20, 2003 (dkt. no. 499); Adoption of San Juan Health District Defendants and San Juan County Defendants' Memoranda Regarding Subject Matter Jurisdiction, filed February 21, 2003 (dkt. no. 501); "Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction" [unsigned

original document submitted by plaintiffs' counsel], filed February 24, 2003 (dkt. no. 502). [3]

The issues on remand were set for hearing on February 24, 2003. At that time, the court heard and considered the arguments of counsel and the matter was taken under advisement. (*See* Minute Entry, dated February 24, 2003 (dkt. no. 503); Transcript of Hearing, dated February 24, 2003 ("Tr. 2/24/03"), *passim.*)

Following the hearing, counsel submitted additional written materials, including plaintiffs' motion for summary judgment. (*See* Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. [**14] no. 504) ("Pltfs' Summ. Judg. Mem. (504)"). [4]

The court revisited the issues on remand at a December 19, 2003 hearing on pending motions:

> [*905] THE COURT: . . . Now people have filed a great deal of material couched under some fairly interesting labels, but they relate really to the question of the subject matter of the mandate, namely the jurisdictional powers of the Navajo Court. And the defendants have filed a memorandum which I think is their effort to deal with the jurisdiction issue on remand and plaintiffs have filed a motion but it relates to the jurisdictional question on remand and it seems to me we have got three questions. We have got the

> jurisdiction of the Navajo Court, which is the subject matter of the mandate. We have got the question then of the jurisdiction of this court and then we have got the question [*906] as to whether immunity is available.
>
> But the first thing we have to decide, it seems to me, is the power of the Navajo Court to do what it did and the effort on the part of the plaintiffs here to enforce the order that was received from the Navajo Court.

(Tr. 12/19/03, at 7:2-18 (the Court).) [5] The court inquired "if anybody wants to add anything in writing, in dealing with the jurisdictional question? [**16] " (*Id.* at 7:19-20.) Plaintiffs' counsel indicated that she wished to submit further written materials. (*Id.* at 8:3-13 (Ms. Rose).) [6] The court then asked if anyone wanted to add anything "in the way of oral argument at this point" as to the issues on remand, and plaintiffs' counsel indicated that she did. (*Id.* at 8:14-9:10 (Ms. Rose).) Counsel presented argument at some length concerning the jurisdictional question, (*see id.* at 9:18-65:13), and the court once again took the matter under advisement. (*Id.* at 66:20-22; *see* Minute Entry, dated December 19, 2003 (dkt. no. 582).)

The filing of motions and memoranda continued. [7] Counsel also submitted several [*907] citations to supplemental authority as allowed by *DUCivR 7-1(b)(4)*. [8]

In May of 2004, plaintiffs' counsel requested that this case be referred to mediation or a settlement conference. [9] Though the defendants initially opposed a

referral to mediation, by the time of the July 6, 2004 hearing on the subject, they had joined in the request, and this court referred the matter for a judicial settlement conference pursuant to the court's Local Rule, *DUCivR 16-3(b)*, deferring further consideration of the matter pending the outcome of the settlement conference. (*See* Minute Entry, dated July 6, 2004 (dkt. no. 657).)

The court set the matter for a status conference on September 28, 2004. (*See* Notice of Hearing, filed September 7, 2004 (dkt. no. 660).) At that time, counsel reported that [**20] the settlement conference had failed, and court and counsel discussed the issues then remaining for decision. (*See* Minute Entry, dated September 28, 2004 (dkt. no. 663); Transcript of Hearing, dated September 28, 2004, *passim*.)[10]

More recently, the court granted the plaintiffs' "Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence [**21] & The 10th Cir. Court 10-7-02 Opinion," filed November 6, 2002 (dkt. no. 438), which *inter alia*, cast the pleadings of the Part II Plaintiffs (Singer, Riggs and Dickson) in their current form, purportedly clarifying the Part II Plaintiffs' claims in light of the court of appeals' October 7, 2002 opinion. (*See* Amended Complaint, filed June 14, 2003 (*nunc pro tunc* to November 14, 2002) (dkt. no. 744), at 98-120.) That amendment to the pleadings, however, did not significantly alter the analytical framework for consideration of the issues on remand; a framework that was examined in detail at both the February 24 and December 19, 2003 hearings, was reviewed briefly at the September 28, 2004 status conference, and now guides this court's consideration and resolution of the issues on remand.

IV. THE CLAIMS OF THE PART II PLAINTIFFS

At the outset, the subject-matter jurisdiction of the Navajo court must be examined in the context of the pleadings that originally invoked that jurisdiction, the parties over whom the Navajo court sought to exercise its adjudicative authority, and the remedies that it prescribed in an effort to resolve the disputes brought before it.

According to Part II of the Amended Complaint, plaintiffs Yanger, Riggs and Dickson (the "Part II Plaintiffs") seek an order of this court enforcing four orders previously entered by the Navajo District Court against several of the named defendants. [*990] including San Juan County, the San Juan Health Services District, Rick Bailey (County administrator and CEO of the District), Reid Wood (District CEO), Laurie Schafer (District Patient Care Director), San Juan County Attorney Troup Helm, County Commissioners Bill Redd and J. Tyron Lewis (both ex-commissioners and Health District Board members) and Health District Board members Roger Atcitty, John Lewis, Karen Adams, and Patsy Clah[illegible] (Amended Complaint at ¶¶ 9-10.)

A. Ms. Donna Yanger

Donna Yanger is the non-Indian spouse of a Navajo Tribal Member who lives outside the boundaries of the reservation, and who worked at Montezuma Creek Clinic, a facility operated by the San Juan Health Services District on the land of the people of which the complaint (Amended Complaint at ¶ 10.) She was employed as the manager of the Montezuma Creek

Clinic from 1995 until the termination of her employment by the SJHSD in December 1998. She is currently employed at the clinic by Utah Navajo Health Systems, Inc., a Native American non-profit organization that has operated the Montezuma Creek Clinic under a Pub. L. 93-638 (Indian Self-Determination and Education Assistance Act) contract with the Navajo Nation since January 1, 2000.

According to her Navajo court pleadings, Ms. Singer "over the years had made numerous minor [mis-]steps and mistakes," as had "employ people throughout the San Juan Health Services District system." Complaint for Damages, filed April 12, 2001, in *Bonnie Singer, et al. v. San Juan County, et al.*, Case No. [illegible] CV 02-001 (Navajo Nation District Court, Shiprock District) ("Navajo Ct. Compl."), at ¶ III. 11-14, *available in* Pertinent Parts of the Navajo Court Record As Attachment to the Amended Complaint, received December [illegible], 2002 (the "Navajo Court Record"). Ms. Singer received an official letter of notice with warning language concerning [illegible] and mistakes in filing, in nearly 10 years of working for the County and the SJHSD. *Id.* at [illegible] ¶¶ 11-14; Exhs. [illegible]. As an "exempt" management employee under the Fair Labor Standards Act, [illegible] Ms. Singer received [illegible] overtime compensation. *Id.* at ¶ III.[illegible]. She was required to keep time cards and [illegible] *Id.* at ¶ III.[illegible].

Ms. Singer alleged that she was acting pursuant to [illegible] Indian [illegible] when she [illegible] Montezuma Creek Health Clinic, [illegible] at a public meeting of the Navajo [illegible] Board of Trustees. [illegible]

scheduled meeting as a participating member of the audience," apparently in June of 1998, (*id.* at 8-9 P 60 & Exh. 64, at [1]-[2]), and that she had been both "privately" [**26] and "publicly" supportive "of a private hospital coming into Blanding." (*Id.* at 9 PP 61-62.) [15]

She further alleged that on or about November 13, 1998, a mistake was made on her time card: "Mrs. Singer was in Blanding when an unknown person at the [*911] Montezuma Creek Health Clinic clocked in on her card." (*Id.* at 7 PP 45-46 & Exh. 30.) The resulting [**27] error came to the attention of District administrators, and on or about November 25, Ms. Singer provided a written explanation of the error. (*Id.* at Exh.32.) Ms. Singer was then given a December 1 memorandum from Reid Wood, Chief Executive Officer of the Health District, referring to allegations of "time card fraud," and she was placed on paid administrative leave. (*Id.* at Exh. 34.) A second memorandum from Wood, dated December 2, advised Ms. Singer that "it has been alleged that you have engaged in employment related misconduct," specifically that she had "submitted false information regarding your hours worked on your time card for the period ending November 22, 1998 by reporting that you worked 80 regular hours when you only worked 68 regular hours," and scheduled a "pre-disciplinary hearing" for December 4, 1998. (*Id.* at Exh. 35.)

Following his meeting with Ms. Singer on December 4, Wood prepared a "Notice of Decision" memorandum, dated December 7, advising Ms. Singer that the allegations that her "time card for the period ending November 22, 1998 was improperly reported," and that she "also approved another employee's time card that

was incorrect" was "supported by [**28] the substantial evidence," and that "it is my decision to terminate your employment as of 5:00 p.m. December 4, 1998." (*Id.* at Exh. 36.)

> As we discussed, as a supervisor you are held to a higher standard of conduct. Your personnel file also indicates that this is not the first time this problem has occurred. . . .
>
> Please be advised that you have a right to appeal this decision by submitting a written notice to appeal with San Juan Health Care Services within ten days of receipt of this notice. If an appeal is filed, your appeal will be submitted to the appeals board. If you fail to file an appeal you waive any right to contest this decision at a later date.

(*Id.*)

Her pleadings did not detail the sequence of events following December 7, 1998 (*e.g.*, her pursuit of an appeal, *see id.* at Exh. 44), but Ms. Singer did allege that at a subsequent grievance hearing on February 12, 1999, "Mr. Wood admitted that 'time cards' were not the problem or cause of Mrs. Singer's discharge from her employment," (*id.* at 7 P 39 & Exh. 39), that Wood and Mary Nielson, the Health District financial officer, had made derogatory verbal remarks about her, casting [**29] doubt on her honesty and integrity, and that these remarks were published to others. (*Id.* at 7 PP 40-41, 12 PP 100-103.)

From the materials submitted by the plaintiffs, it appears that in or about April of 1999, Ms. Singer filed complaints with both the Office of Navajo Labor Relations (ONLR) and the Navajo Nation District Court in Shiprock, New Mexico, together with applications for temporary restraining orders and preliminary injunctive relief. (*See id.*; Pertinent Parts Navajo Ct. R. ("Docket," & "ONLR App for TRO & P.I." Tabs).) In both forums, Ms. Singer sought "reinstatement . . . to her merit position of employment as manager of the Montezuma Creek Health Clinic," with back pay, benefits and seniority status, as well as compensatory and punitive damages, attorney's fees, the retraction and expungement of all derogatory remarks and records, and a public apology. (Navajo Ct. Cmplt. at 39-41.) Ms. Singer also sought affirmative relief requiring the County and the District to implement a merit system for employees, an employee bill of rights, and the Navajo Preference in Employment Act, as well as "proportionate representation on the SJHSD for Aneth [*912] and Red Mesa chapters [**30] commensurate with the population of Navajos living in the San Juan County boundaries," presumably referring to representation on the Health District board. (*Id.* at 40-41.) She requested appointment of a special master "to protect the employment rights of the Montezuma Creek Clinic employees and possibly the Monument Valley Clinic (also serving the Navajo Nation)" and the imposition of an unspecified "fine or sanction"against the defendants "for SJHSD's callous disregard for the poverty stricken, down trodden, condition of health care within the Navajo Nation, an independent sovereign and federally recognized reservation, due primarily to the historical subjugation of the United States that has precipitated

such long standing problems as recognized in federal law." (*Id.* at 42, 43.) She also asked the Navajo court "for exclusion of the defendants Mr. Wood, Mrs. Nielsen and Mrs. Shafer, for all time from coming within the Navajo Nation's territorial boundaries . . . for endangerment of the public safety and callous disregard for the health and welfare of the Navajo Nation," and for "such further sanctions, fines, penalties as the Court feels is necessary [**31] and just to protect the health, safety and welfare of the tribal members in the areas of the Navajo Nation." (*Id.* at 43.) [16]

B. Mr. Fred Riggs

Fred Riggs is an enrolled member of the Navajo Nation who resides within the boundaries [**32] of the Navajo Reservation in New Mexico, and has worked for many years as a Physician's Assistant at the Montezuma Creek Clinic. Like Ms. Singer, Mr. Riggs is currently employed by Utah Navajo Health Systems, Inc., the tribal contractor that has operated the Montezuma Creek Clinic since January 1, 2000.

Like Ms. Singer, Mr. Riggs also had problems with his SJHSD "time card" in November of 1998.

According to his Navajo court pleadings, by a letter dated November 2, 1998, SJHSD patient care director Laurie Shafer offered Riggs "the position of a Mid-Level Provider for San Juan Health Care Services," with full-time work at the Montezuma Creek Clinic at a rate of pay of $ 60,000 per year "with full benefits and $ 1000 allowance for CME's." (Navajo Ct. Cmplt. at 9 P 66 & Exh. 46.) The letter advised that "you will be required to use a time clock while you are working," and that "this position may require additional duties as

necessary." The District abruptly terminated his employment at the Montezuma Creek Clinic on or about November 4, 1998 as a "reduction in force," then rehired him almost immediately, upon Riggs' signature accepting Shafer's offer. (*See id.* at Exh. [**33] 46.)

Riggs thus continued to work at the Montezuma Creek Clinic, but in a lesser position at a significantly reduced rate of pay--purportedly $ 10,000 less per year than he had been receiving up to that time. (Navajo Ct. Cmplt. at 9 P 66 & Exh.45, at PP 8-11 (Fred Riggs Affidavit).) And for [*913] the first time in his career, Riggs was required to keep "time cards." (*Id.* at Exh. 45, at P 18.)

Riggs recounted an incident on or about November 11, 1998, in which he had agreed to take an emergency call in Blanding later that day, outside his existing job description. He averred that he "asked administration personnel how, and how much he was to be paid, Reid Wood threatened his job acting as if [Riggs] was lazy, uncooperative, and insubordinate and greedy." (*Id.* at 9 P 70 & Exh. 45, at PP 4-7.)

According to Riggs, his very first time card in November of 1998 reported "a day and a half of leave as 8.4 hours instead of 12 hours," an error of which he insists he was unaware. (*Id.* at Exh. 45, at P 25.) Like Singer, Wood advised Riggs in writing on December 1, 1998 that he faced allegations of "time card fraud" and placed him on administrative leave with [**34] pay (*Id.* at 10 PP 72-73 & Exh. 45, at PP 12, 25, Exh. 48.) Remarkably, the "specific conduct" alleged against Riggs was identical to the allegation made against Singer that same day, namely that Riggs had "submitted false information regarding your hours

worked on your time card for the period ending November 22, 1998 by reporting that you worked 80 regular hours when you only worked 68 regular hours." (*Id.* at Exh. 49.) [17] Wood advised Riggs that he had scheduled a "pre-disciplinary hearing" for December 4, 1998.

Following [**35] the December 4th "hearing," Wood advised Riggs in writing that he had determined that the allegation that Riggs' time card "for the period ending November 22, 1998 was improperly reported" was "supported by the substantial evidence," and that "it is my decision to place you on 30 days probation," meaning that Riggs' "time card will be audited for sufficiency for that period of time." (*Id.* at Exh. 50.) As he had done with Singer, Woods advised Riggs that he could appeal Wood's determination within ten days of receipt of his memorandum. (*Id.* at Exh. 50.)

Riggs subsequently returned to work on thirty days' probation. (*Id.* at 10 P 74 & Exh. 50.) According to Riggs, he was kept on probation for longer than thirty days, (*id.* at 10 P 75), and was given a verbal warning for placing "the time for President's Day in the wrong place on the time card." (*Id.* at Exh. 45, at P 33.)

Mr. Riggs gave written notice of his grievance concerning Wood's disciplinary action on or about December 15, 1998, (*see id.* at Exh. 60), and a "grievance hearing" was held on February 12, 1999. (*Id.* at Exh. 45, at PP 27, 28.) Riggs asserts that the February 12th [**36] hearing panel was "tainted" by Wood's influence (Wood had recently been appointed CEO of the Health District), and was "constituted in such a way that impartiality can not be achieved." (*Id.* at Exh. 45, at PP 35-40.) Following that hearing, Riggs averred that the

"SJHSD is refusing to take charge of the time card fraud out of [his] records though it is wholly fallacious and without foundation, and instead wish[ed] to place a letter in the file saying it was not proven and that [Riggs] had requested the charge be removed." (*Id.* at Exh. 45, at P 29.)

Riggs complained that his "reduction in force" and resulting reduction in pay did not comply with the Navajo Preference in [*914] Employment Act, "did not comply with a merit system," and was discriminatory. [18] (*Id.* at 9 PP 67, 68.) He alleged that the SJHSD had failed to implement a merit system as required by Utah law, [19] and that Mr. Wood had treated him and other Montezuma Creek Clinic employees "differently than managers and other employees in the SJHSD system who had numerous similar time card errors on their cards, including the payroll department." (*Id.* at Exh. 45, at P 30 (Fred Riggs Affidavit).) He complains that [**37] he requested training and orientation on time cards "and was met with Reid Wood's anger and impatience . . . ." (*Id.* at Exh. 45, at P 34.) "SJHSD has not disciplined Mr. Riggs with common sense or respect for him as a person." (*Id.* at 32 P 286.)

[**38] In both the Navajo court and ONLR proceedings, Riggs sought reinstatement to his position and rate of pay prior to the November 1998 "reduction in force," with back pay, benefits and seniority status. Like Ms. Singer, Riggs requested a public apology, expungement of disciplinary action from his file, a "published retraction of all derogatory allegations and comments made" against him, and an award of both compensatory and punitive damages ($ 3,000,000 each). (*Id.* at 39-40.) Like Ms. Singer, Riggs also sought sweeping affirmative relief requiring the Health

District to implement a merit system, an employee bill of rights, the Navajo Preference in Employment Act, as well as proportionate representation of the Aneth and Red Mesa chapters; he requested the exclusion [*915] of Wood, Nielson and Shafer from the reservation "for all time," and the appointment of a special master to protect his employment rights and those of his fellow Montezuma Creek Clinic employees. (*Id.* at 40-43.) [20]

[**39] **C. Mr. Allison Dickson**

Allison Dickson is an enrolled member of the Navajo Nation, living in Utah within the boundaries of the Navajo Reservation. Like plaintiffs Singer and Riggs, he is currently employed at the Montezuma Creek Clinic by Utah Navajo Health Systems, Inc., the tribal contractor that has operated the clinic since January of 2000.

Mr. Dickson was initially hired by the Health District in March of 1998 for six months as a full-time temporary office clerk, handling medical records and billing at the Montezuma Creek Clinic and filling in for another employee who was away on maternity leave. Dickson continued working at the Clinic after the absent employee returned to work. He applied for full-time *permanent* employment in November or December of 1998, but his request was rejected by the District.

Dickson complained that this denial of permanent full-time employment violated an established Health District policy that "mandates that a person 'will' become a 'regular' employee after 520 hours" of employment by the District. (*Id.* at 9 Colo. 200, 11 P 88 & Exh. 55.) The excerpt from the District personnel

policies and procedures relied upon by Dickson reads as [**40] follows:

> Introductory Period. Each new, transferred, or promoted full-time and part-time employee will be subject to an initial introductory period. The length of the introductory period is generally 520 working hours (the equivalent of three months of full-time work), those who are in a supervisor or exempt profession position will have a 6 month introductory period. During this time period the new employee must demonstrate the ability and willingness to perform the job. During this period, the employee's work will be continuously evaluated by the supervisor. At the end of the period, performance will ususally [sic] be reviewed by the supervisor to determine if employment should be continued. Successful completion of the introductory period will ususally [sic] be documented in writing as designated in the Employee Evaluation section. An employee may either resign or be terminated during the introductory period, with neither the employee nor San Juan Health Care Services required to give the other prior written notification or explanation.
>
> *Upon successful completion of the introductory period, the new employee will become a regular employee, unless hired specifically* [**41] *for a short-term job.* Employment [*916] as a regular employee

> is still "at will", and regular employees may be terminated at any time, with or without notice, and with or without cause.

(*Id.* at Exh. 55 (emphasis added).) Dickson alleges that he "has worked over 520 hours, *in addition to* the six month temporary position," but had still been refused "regular" permanent full-time employment. (*Id.* at 11 PP 87, 90-91, 96 (emphasis added).) Dickson also alleges that at Wood's instance, he was denied a hearing on his grievance at about the same time that Singer and Riggs' appeals were to be considered in February 1999. (*Id.* at 11 PP 93-94; *see id.* at Exhs. 51, 56.)

Mr. Dickson's principal claim before the Navajo court thus depended on the construction and application of the Health District's own personnel policies and procedures--in particular the language quoted and italicized above. That claim thus becomes a question of the terms of his contractual employment relationship with the District; if District policy is construed to create a "property" interest in his continuing or prospective employment, it becomes a question of due process as well. [21]

[**42] Dickson also complained about "racially insensitive and derogatory remarks and policies by Mr. Wood and Mrs. Nielsen," (*id.* at 11 P 95), remarks allegedly made at a January 5, 1999 staff meeting with Montezuma Creek Clinic "P.A.R." (patient accounts receivable?) personnel at which they discussed "the Certificate of Indian Blood in which patients need to have on file before receiving their medical care." (*Id.* 11 P 95 & Exh. 57.) Apparently, Wood asked if Certificates of Indian Blood "were like dog tags," (*id.* at 16 Colo. 398, 27 P 249 & Exh. 57), [22] while at some point, District

financial officer Mary Nielson publicly labeled the Montezuma Creek Clinic billing clerks" as "rebellious" and "insubordinate." (*Id.* at 28 PP 257, 259 & Exh. 45, at P 26 (Affidavit of Allison Dickson).) Plaintiffs alleged that when Dickson pressed his claim for full-time permanent employment, "Mrs. Nielsen told Mr. Dickson to cut his hours back to 32 and reminded him his position probably 'wasn't that necessary.'" (*Id.* at 35 Kan. 722, 12 P 104.)

[**43] The relief originally sought by Dickson largely parallels that requested by Singer and Riggs: he would be made "a full time employee with all benefits"; all "non hiring action" would be expunged from his file; he would receive a public apology, a formal retraction of any derogatory remarks made about him by SJHSD administrators, and an award of $ 3,000,000 in compensatory [*917] damages and $ 3,000,000 in punitive damages. (*Id.* at 39-41 (Prayer for Relief).) [23] Dickson also joined Singer and Riggs in seeking affirmative relief as to Health District personnel practices, including the implementation of a merit system and an employee bill of rights, compliance with the Navajo Preference in Employment Act, as well as the appointment of a special master, proportionate representation of two Navajo chapters in SJHSD governance, and the other equitable relief summarized above. [24]

D. The Nature of Plaintiffs' Claims

The plaintiffs' original Navajo court complaint alleged that "all the captioned plaintiffs have standing to sue herein due to the intentional injurious acts the have been perpetrated upon them by the defendants,"

and that "all of the events herein complained of giving rise to these proceedings occurred at or near the Montezuma Creek Health Clinic and/or *in the course of the plaintiffs[']* *employment* with the Montezuma Creek Health Clinic which is physically located within the exterior boundaries of the Navajo Nation." (*Id.* at 4 P 21 (emphasis added).) They alleged that the Navajo court

> has jurisdiction over the parties and subject matter pursuant to 7 NNC 253 and 7 NNC 254, and the Navajo Nation's independent and inherent sovereignty that is encouraged by federal Statute at [**45] *25 U.S.C. 450a.*, and is undiminished by the Treaty of 1868, and Utah Code sections 9-9-208 and *9-9-209* among others, and the United States Supreme Court" exception" in ***Montana v. United States,*** *450 U.S. 544 at 565 to 566 (1981).* See likewise the attached MEMORANDUM OF LAW, attached hereto as Attachment C.

(*Id.* at 5-6 P 29 (font variations in original).)

Plaintiffs' pleaded causes of action included civil rights claims alleging the denial of freedom of speech, (*id.* at 17-18 PP 170-183); freedom to assemble, (*id.* at 19 PP 184-190); due process, (*id.* at 19-22 PP 191-214); and equal protection, (*id.* at 26-31 PP 243-280) [25]– "as protected by the Navajo Nation, the United Nations and the United States," as well as tort claims of "wrongful hiring," (*id.* at 22-23 PP 215-220); [26] defamation, (*id.* at 23-24 PP 221- [*918] 229); "tortious interference with future contractual relations," (*id.*); [27]

intentional and negligent infliction of emotional distress, (*id.* at 32-33 PP 281-296); "theft," (*id.* at 24-26 PP 230-242); [28] "violation of fiduciary duties," (*id.* at 33 PP [**46] 297-300); [29] "misfeasance," (*id.* at 33-34 PP 301-309); and "malfeasance in office," (*id.* at 35-39 PP 310-348). [30] Most of these causes of action were footed upon factual allegations arising from the events involving plaintiffs' employment at the Montezuma Creek Clinic by the Health District, as summarized above. The rest, it turns out, were surplusage. [31] Absent from the Complaint was any claim of breach of contract.

[**49] As originally pleaded, then, the plaintiffs' claims before the Navajo Nation District Court were employment-related claims. [32] They arose out of each plaintiff's individual employment relationship with the Health District, and the plaintiffs sought compensatory legal and affirmative equitable relief that would resolve their |*919| existing employment disputes. Indeed, the plaintiffs asserted that "all Labor Commission and Office of Navajo Labor Relations claims of the Plaintiffs will not be prohibited from being heard in this Court, after such time as the plaintiff's employment claims have gone through their respective administrative process," (*id.* at 5 P 28), clearly indicating that Singer, Riggs and Dickson also had employment claims then pending before the Navajo labor agencies--claims as to which they had not yet exhausted their administrative remedies at the time they commenced the Navajo court action in April of 1999. (*See infra*, at 125-130.)

[50] E. Plaintiffs' Supplemental Pleading**

A month after entry of the Navajo court's December 28, 1999 Order, (*see infra* at 32-40), plaintiffs Singer, Riggs and Dickson filed "Plaintiffs' Supplemental

Pleadings to the Original Pleadings," dated January 28, 2000, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (a copy of which is annexed to the Amended Complaint (dkt. no. 744)) ("Navajo Ct. Supp. Pldg."), with the Navajo Nation District Court. The Supplemental Pleadings purported to add claims of "Obstruction of Justice," "Misuse of Judicial Process," "Defamation, per se," and "the endangerment of Navajo patients at Montezuma Creek Clinic." (Navajo Ct. Supp. Pldg. At 2 P 3.) The plaintiffs' new claims were said to be "based upon the Court's Findings of Fact in the Court's Preliminary Injunction Order issued on the 28th day of December, 1999," including "factual findings therein pertaining to the defendant's counsel" and the conduct of the Navajo court litigation, and the "intentional and malicious disruption of operations and services of the Montezuma Creek Health Clinic." (*Id.* [**51] at 2 PP 4, 5.) The Supplemental Pleading made no additional factual allegations in support of the plaintiffs' new claims, but augmented their prayer for relief to demand that "each of the defendants, both jointly and severely [sic], be ordered to pay damages to the plaintiffs in the amount of $ 18,000,000 USD (Eighteen Million Dollars);" and that

> each of the defendants, both jointly and severely [sic], be ordered to pay additional damages to the plaintiffs pursuant to 7 NCC 701 in the amount of $ 6,000,000 USD (Six Million Dollars) *to be paid directly to Montezuma Creek Clinic* to be used as the management of Montezuma Creek Clinic sees fit in the best interest of the Native

> American People, and not to be used for employment compensation or to take the place of the insurance payments made in behalf of the Native American patients, without express authority of this Court;...

(Navajo Ct. Supp. Pldg. at 3 P 7(b) (emphasis added).) [33] It appears that the Navajo court granted plaintiffs leave to file their Supplemental Pleading on February 22, 2000. (*See* Order for Leave to Supplement the Pleadings, signed February 23, 2000 (a copy of which [**52] is annexed to the Amended Complaint (dkt. no. 744)).) [34]

[**53] V. THE NAVAJO COURT ORDERS

The Part II Plaintiffs sought enforcement of four written orders entered by the Navajo Nation District Court for the Shiprock, New Mexico Judicial District: (1) the "Findings, Opinion and Judgment at Preliminary Injunction," dated December 28, 1999, in *Donna Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (the "December 28, 1999 Order"); (2) the "Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order," entered March 1, 2000 (the "March 1, 2000 Order"); (3) the "Special Order in Aid to Satisfaction of Preliminary Injunction," signed March 6, 2000 (the "March 6, 2000 Order"); and (4) the "Order Mandating that All Defendants' to be Bound by the Preliminary Injunction Order," entered March 15, 2000 (the "March 15, 2000 Order"). (*See* Amended Complaint at 99, and the copies of three of the orders annexed thereto.)

As noted above, the court of appeals affirmed the dismissal of the Part II Plaintiffs' claims as against defendants Truck Insurance and R. Dennis Ickes because of the Navajo court's lack of subject-matter jurisdiction over those defendants [**54] under *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). MacArthur v. San Juan County, 309 F.3d at 1222-1225.* Therefore, the question of enforcement of the Navajo court's March 15, 2000 Order--which purported to bind Truck Insurance and Ickes to that court's prior orders--is no longer before this court. [35]

[**55] [*921] **A. The December 28, 1999 Order**

The Navajo Nation District Court's December 28, 1999 "Findings, Opinion and Judgment at Preliminary Injunction" serves as the centerpiece of the Part II Plaintiffs' claims in this proceeding. Styled and written as a preliminary injunction, the December 28, 1999 Order made preliminary fact findings, (*see* December 28, 1999 Order at [3]-[11]), discussed the factors bearing upon the issuance of a preliminary injunction, (*id.* at [11]-[20]), and prescribed sweeping equitable relief in favor of Singer, Riggs and Dickson as to their specific employment disputes with the Health District, and in favor of Navajo health care recipients generally as to a litany of concerns involving the District's administration of health care services at the Montezuma Creek Clinic. [36] (*Id.* at [20]-[22].) The Order also anticipated that "the proceedings in chief herein be and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and compromised by the parties by stipulation

on the limited factual; legal; and damage issues remaining." (*Id.* at [22].)

[**56] On a preliminary basis, at least, the Navajo court made findings as to many of the transactional facts alleged by Singer, Riggs and Dickson, as summarized above. (*See supra*, at 12-26.)

1. Findings re: Mr. Riggs

As to Mr. Riggs, the Navajo court found, *inter alia*, that on or about November 11, 1998, Riggs had been terminated as a "RIF and rehired with a $ 10,000 pay cut; was made to start using a time card; and lost three years of raises," (December 28, 1999 Order at [3]); that "Mr. Riggs accidentally represented 8.4 hours as a day and a half, or 12 hours," and that "as a result of this time card mistake Mr. Riggs was disciplined," even though he "never received any warning letters; any time card instruction; nor any time to correct [*922] any alleged deficiencies, either prior to this November RIF, or the aforestated discipline," and even though "as a bona fide professional, [he] is exempt from time card keeping requirements," (*id.* at [4]); that Riggs was offered "a promotion to fill the position made vacant by Ms. Singer[']s termination, as manager of the Montezuma Creek Clinic," but that Wood "immediately withdrew the offered promotion because Mr. Riggs had [**57] accused him of discrimination" in pursuing a formal grievance as to the disciplinary action, (*id.*); that after Riggs' grievance hearing, "he was placed on an additional 30 days[']] probation without justification," (*id.*); and that evidence showed "similar and multiple errors on time cards throughout the" District, and in November 1998, "just one week prior to Mr. Riggs being disciplined, Reid Wood[']s time card had ink;

cross-outs; and write ins, errors for which others, notably the plaintiffs were disciplined," but Wood "was not similarly disciplined for his time cards errors." (*Id.* at [5].) The Navajo court also found similar errors on time cards kept by Mary Nielson, District financial officer, (*id.*); that another "caucasian physician assistant" had "time cards showing he was not required to punch in or out, either for or after the November, 1998, RIF;" (*id.*); that the November 1998 "RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Rigg; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant;" ([**58] *id.* at [3]); and that

> The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law applicable to his employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions toward Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District; . . . .

(*Id.* at [5].) The court found that the defendants had not refuted the allegation that they had used Riggs' case to make "an example of what happens to people who take

greivance of decisions of" the Health District and "who make allegations of racial or other discrimination[.]" (*Id.*)

2. Findings re: Ms. Singer

Concerning Ms. Singer, the Navajo court found, *inter alia*, that "on the 13th day of November, 1998, Ms. Singer was unaware of another person[']s clocking in on her Montezuma Creek Clinic time card [**59] when she was in Blanding, Utah;" "that Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question;" and "that the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Ms. Singer admitted to having made the time card error[.]" (*Id.* at [6].) Nonetheless, the court found that Singer had been "charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated;" (*id.*) that District administrator Rick Bailey had "participated in the decision to terminate Ms. Singer," and that he "proceed[ed] as her grievance hearing officer anyway" on the advice of the County Attorney. (*Id.*) Reviewing the testimony adduced at the hearing, the Navajo court noted that plaintiffs' accounting expert "found no pattern of fraud in Ms. Singer[']s time cards;" that "he attributed Ms. Singer[']s time card errors to the fact that [*923] she was required to be clocking in and out at three different work places and had so many responsibilities," and that in his experience, "managers are not usually required to use time cards because of their FLSA exemption; . . ." (*Id.* [**60] at [7].) The court also noted that the "caucasian manager of the Monument Valley Clinic, also within the San Juan Health Services District, was not

obliged to punch in and out on time cards," and that other District employees whose "time cards are worse than Singer[']s" were "never disciplined; charged with fraud; or terminated." (*Id.* at [7]-[8].)

Like Mr. Riggs, the Navajo court found that the defendants "offered absolutely no credible . . . evidence of the San Juan Health Services District affording . . . Ms. Singer . . . any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment;" that the defendants offered "no evidence of any consideration of the Navajo Preference in Employment Act in its actions toward Ms. Singer;" and that, as with Riggs, the defendants did not "offer any evidence that the defendants had not administratively conspired to" use Singer's case to "make an example . . . of what happens to people who stand up for their rights" and pursue grievances against the Health District, "who make allegations of racial or other discrimination," or who "take any position in opposition [**61] to San Juan Health Services District or the defendants themselves[.]" (*Id.* at [8].)

3. Findings re: Mr. Dickson

The Navajo court preliminarily found that "Mr. Dickson started working for the San Juan Health Services District as a full time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status;" that 'Mr. Dickson['s] time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired;" that the District policies and procedures state "that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San

Juan Health Services;" and that "the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th day of December, 1998, that he be given regular employment status[.]" (*Id.* at [8]-[9].) The court further found that "the time cards entered into evidence demonstrate[] the current Montezuma Creek Clinic manager's nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority;" and that District records "show that there is no other [**62] employee of the San Juan Health Services District with Mr. Dickson's time in service measure[d] by regular work hours that is not a regular permanent employee with benefits of regular status employment." (*Id.* at [9].) [37]

4. Preliminary Relief Under the December 28, 1999 Order

Based upon the findings set forth in the December 28, 1999 Order, and "with minor adaptation from the arguments delivered to the Court," the Navajo court "largely adopted the position of the plaintiffs to the legal reasoning of these proceedings." (*Id.* at [11].) "The Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary [*924] injunction in their favor," *MacArthur, 309 F.3d at 1219*, [**63] and sought to fashion affirmative remedies for the plaintiffs' employment grievances, treating them as involving more than purely economic harm:

> The case law of the Navajo Nation provides that an injunction is extraordinary

> relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. Gudac v. Marianto, 1 Nav. R. 385, Nav. App. Feb. 28, 1978. The United States Supreme Court has likewise found that while economic loss alone generally does not constitute irreparable injury, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found." *Sampson v. Murray, 415 U.S. 61, 92 n. 68, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974).*

(December 28, 1999 Order at [11].) In the Navajo court's view, "all these claims raise[d] issues clearly extending well beyond the mere loss of income or loss of a job," and went "directly into the wellbeing of the plaintiffs and Navajo Nation citizens" and "as argued by the plaintiffs, go to the soul of a person and their inalienable rights"--fundamental interests, the importance [**64] of which "exceeds monetary value." (*Id.* at [2].)

> Damages such as deprivation of rights; discrimination; denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person's reputation are all deprivations that far exceed mere deprivation of money, or employment of embarrassment. . . . No amount of money . . . can fully compensate the plaintiffs and Native American

> population in the Montezuma Creek for these past and ongoing substantial and inestimable damages.

(*Id.* at [18].)

Besides the individual claims of Singer, Riggs and Dickson, the Navajo court made reference to evidence already received concerning "patient welfare" and "clinic operations" at the Montezuma Creek Clinic, *e.g.*, the District's "billing of IHS eligible patients," which discouraged those patients from seeking further treatment at the clinic, as well as "stoppage of ambulance services;" "interference with pharmaceutical services;" and "stoppage of lab services" at the clinic. (*Id.* at [13], [15]). "These plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights . . . and [**65] as well the San Juan Health Services District's *endangerment of the Native American and Navajo public*," persuading the court that

> in this case, a preliminary injunction will *insure the protection of overwhelming public interest by way of the restoration and preservation of patients' welfare in the northeastern sector of the Navajo Nation;* restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs; customs; and economic levels; . . . thereby improving adherence to the provisions, terms, and conditions of the Navajo Preference in Employment Act; . . . .

(*Id.* at [12], [13] (emphasis added).) The court thus fashioned injunctive relief in the December 28, 1999 Order to vindicate not only the personal interests of the named plaintiffs, but also the interests of many Navajo patients served by the Montezuma Creek Clinic, as well as the Navajo Nation's broader governmental interest in safeguarding "the health or welfare of the tribe." *Montana, 450 U.S. at 566.* [*925] (*See* December 28, 1999 Order at [20].)

Though it acknowledged "that the Montezuma Creek Clinic will be removed from the control and supervision [**66] of the San Juan Health Services District beginning the 1st day of January 2000"--*four days* after the entry of the December 28, 1999 Order--the Navajo court proceeded to grant preliminary injunctive relief against the County and Health District defendants, ordering that the defendants "immediately reinstate Singer and Riggs to their previous positions of employment," [38] and "immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due him from the occasion of being eligible for such status." (*Id.* at [14], [20]). The December 28, 1999 Order further required the defendants to "delete and expunge all the charges and writings pertaining to the December 2nd through December 8th charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file"; the defendants were ordered to "immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits . . . with all such compensations to [**67] be

credited and/or paid immediately," and further ordered "to issue full payment of attorney's fees, costs and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction" and "not later than the 31st day of December, 1999,"--three days later--"by and through the Registry of this Court," (*id.* at [21]); as to the "time card" issue, the defendants were ordered "to not put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise[.]" (*Id.*)

In addition to mandating immediate relief in favor of Singer, Riggs and Dickson on their employment [**68] claims, the December 28, 1999 Order imposed a series of express prohibitions affecting the defendants' operation of the Montezuma Creek Clinic: the court ordered the defendants "to not interfere with clinic operations or move any clinic personnel," (*id.* at [21]); the defendants were prohibited from "eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation"; "interfering with the laboratory services" or "pharmaceutical services" to "the Montezuma Creek Clinic," or "interfering with any form of patient care by, among any other matter or things, billing IHS patients," (*id.* at [22]); the defendants were also ordered "to assist the Montezuma Creek Clinic and the local Navajo Chapters . . . by any means necessary . . . to help diabetic IHS patients to return to the Montezuma Creek Clinic for treatment," including informing them "that as an IHS patient they do not have to pay for their health care treatment" at the clinic. (*Id.* at [22].) [39]

As the court of appeals observed:

> The Navajo court was troubled by what it perceived as a sharp drop in visits to [*926] the clinic by diabetic patients. In the court's [**69] view, "The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention."

309 F.3d at 1219 (quoting December 28, 1999 Order at [13].).

B. The March 1, 2000 Order

The Navajo court's "Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order," dated March 1, 2000, made additional findings of fact and conclusions of law in light of the defendants' objections to the December 28, 1999 Order, explaining in some detail its rejection of the defendants' assertions that (1) they had been denied the services of a certified court reporter during the preliminary [**70] injunction hearings; and (2) they had been denied due process because of omissions in the existing transcripts of the taped proceedings caused by inaudible or garbled sections of the court's tape. (March 1, 2000 Order at 1-5.) The March 1, 1999 Order also discussed the use of evidence received during the preliminary injunction hearings as evidence for purposes of a jury trial on the merits, to which use the defendants had objected as well:

> the Court is obliged by Rule of Court and in the exercise of judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief as though occurring during the trial on the merits, and that evidence becomes a part of the record at trial and need not be repeated at trial. See *Rule 65(d)*."

(*Id.* at 7 (emphasis in original); *see id.* at 5-9.) [40] The court indicated that as for the plaintiffs, the receipt of such evidence "does substantially reduce their burden of proof which has already well been met even as to the case in chief." (*Id.*) [41] In contrast, "the defendants," in the court's view, "failed to put on any credible evidence to rebut the volume [**71] of testimony and evidence of the plaintiffs, after having ample opportunity to do so." (*Id.* at 8.)

The March 1, 2000 Order also reaffirmed in conclusory terms the Navajo court's initial finding that it had jurisdiction over the plaintiffs' [**72] claims, and over "the defendants" as parties:

> The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation['s] territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with *Dodge v. Nakai, 298 F. Supp. 17 (Ariz. dist. 1968)* and *Clark v. Barnard, 108 U.S. [436, 2 S. Ct.*

878, 27 L. Ed. 780] (1883). This court has jurisdiction.

(*Id.* at 10.) The "legal foundations for jurisdiction in this case" included the Navajo Nation's inherent sovereignty, the Navajo Nation Code, *25 U.S.C. § 1301* and [*927] *1302*, the Montana and Strate decisions, and the United States Supreme Court rulings in *Clark v. Barnard, 108 U.S. [436, 2 S. Ct. 878, 27 L. Ed. 780] (1883)*, as cited approvingly in *College Savings Bank v. Florida [Prepaid] Post Secondary Education Expense Board, et al., [527] U.S. [627], 119 S. Ct. 2199, 144 L. Ed. 2d 575* decided June 23, 1999[.]"

(*Id.* (citing *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, and *Strate v. A-1 Contrs., 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997))*. [42]

[**73] The March 1, 2000 Order not only denied the defendants' motion to dissolve the preliminary injunction, it recast *the preliminary injunction itself,* doing so in even more stringent terms: "The Preliminary Injunction as issued shall be carried out immediately, and *no later than the 3rd day of March, 2000,* in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt powers of this Court," (*id.* at 12 (emphasis added)); the "defendants be and are hereby ordered to immediately reinstate Mrs. Singer as a x-ray and ultrasound technician making her whole to the 1st day of November 1998, not later than the 3rd day of March, 2000," to "immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation" prior to the November 1998 "reduction

in force," with "written confirmation delivered to this Court on or by the 3rd day of March, 2000," and to "immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic" with payment of "all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status," also with confirmation [**74] "on or by the 3rd day of March, 2000 . . . ." (*Id.* at 12.) The defendants were again ordered to "pay immediately all due income . . . including but not limited to full back pay and compensation as well as back benefits," to be confirmed "by the 3rd day of March, 2000," and they were again ordered to pay the plaintiffs' attorney's fees, costs and expenses--this time by March 31, 2000, "or each and every one of the defendants shall be subject to execution on their personnel [sic] properties, and otherwise individually subject to the contempt powers of this Court[.]" (*Id.* at 13.) The prescribed elimination of time cards for managers and physician's assistants was also amplified by a requirement that the defendants "provide a copy of the written policy to this effect on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court;" (*id.*); the same March 3, 2000 deadline was imposed upon the required expungement of Ms. Singer's and Mr. Riggs' personnel files. (*Id.*)

The March 1, 2000 Order also reiterated the December 28, 1999 Order's prohibitions affecting the operation of the Montezuma Creek Clinic, *e.g.*, the defendants were "immediately [**75] ordered to cease billing eligible IHS patients for medical services," with the added requirement that "the defendant shall make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st

day of January, 2000," to be confirmed "on or before the 3rd day of March, 2000[.]" (*Id.* at 14.) "The Preliminary Injunction, and findings of the Court, accordingly shall remain undisturbed[;]" in the Navajo court's view, disturbing the preliminary injunction "would continue to place Navajo *employees* and *patients* . . . in harm's way. Navajo common law, its customs and traditions, mandate that the Court protect the [*928] people, and this Court shall not hesitate to exercise all its powers to do so." (*Id.* at 11 (emphasis added).)

The text of the March 1, 2000 Order concluded by setting the case for a pretrial conference on April 18, 2000. (*Id.* at 15.)

Attached to the end of the March 1, 2000 Order was an additional page, unsigned and undated, that provided: "that in the event that the defendants fail to obey the Order of this Court, commencing the 4th day of March, 2000, the defendants shall be fined at the rate of $ 10,000 (Ten Thousand [**76] Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety"; and further, that "each and every personal defendant and defendants[']] counsel will pay $ 1000 per day of the $ 10,000 daily fine beginning on March 2, 2000, from their own personal assets." (*Id.* at 16.)

By the December 28, 1999 Order, as amplified by the March 1, 2000 Order, the Navajo Nation District Court for the District of Shiprock, New Mexico had thus assumed direct supervisory authority over the day-to-day operations of San Juan Health Services District facilities located within or serving Navajo patients within the boundaries of the Navajo Reservation. The Navajo court's obvious dismay and

annoyance with the defendants' conduct--at least as portrayed by the plaintiffs--became ever more apparent with each order it entered:

> All of the above enumerated actions of the defendants and defendants' counsel, have here constituted a pattern of behavior that only magnifies and exemplifies past and continued deprivations of the plaintiffs' inalienable rights, be they tribal or federal in nature, and harm to Native American patients and community in the Montezuma Creek area . [**77] . . . Such actions demonstrate the arrogance of the defendants, their cultural insensitivity, and contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

(December 28, 1999 Order at [18]; *see also id.* at [15] (harm to Singer "done simply at the folly of her oppressors").[43])

> The defendants' motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the

> plaintiffs, and innocent patients and families relying on the clinic for health care.
>
> Likewise such cold, insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants[']bad faith to these proceedings and presents a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of harm of their [**78] malignant acts, and who lack any remorse for their [*929] harm to plaintiffs, the patients and this Court.

(March 1, 2000 Order at 11.)

The March 1, 2000 Order made it plainly apparent that the preliminary injunctive relief mandated by the Navajo court had already ranged far beyond the original pleadings asserting the employment claims of the named plaintiffs [**79] Singer, Riggs and Dickson, [44] and deliberately so.

C. The March 6, 2000 Order

Ostensibly granting a further motion by the plaintiffs, the Navajo court's March 6, 2000 "Special Order in Aid to Satisfaction of Preliminary Injunction" decreed that the "defendants are hereby restrained from alienating any and all money, property and assets of any type until the plaintiffs are paid their relief as granted" in that court's prior orders; the order required [**80] that "a list of all assets be immediately given to the plaintiffs," together with "complete income tax return[s] for 1998 and 1999," and further, that the

"defendants "immediately list the plaintiffs *first in order of priority as secured creditors* on the files of the County Recorder of San Juan County and any other county wherein their property is located[.]" (*Id.* at 1 (emphasis added).) [45] "Any disobedience to this Order will be viewed as contempt of the Court" and, the order continued, "warrants for the arrest of the defendants disobeying this Order will issue[.]" (*Id.* at 1-2.)

Curiously absent from the Navajo court's December 28, March 1 and March 6 Orders were any fact findings as to the specific *amount* of "all commensurate back pay and benefits as may be due to" each named plaintiff, or the "full payment [**81] of attorney's fees, costs, and expenses associated with these proceedings to date," [46] to be "paid by cashier's check" to the plaintiffs within only a few days of the entry of the March 1, 2000 Order. (March 1, 2000 Order at 13.) Nor did those orders prescribe any procedure or mechanism by which those sums were to be quantified or liquidated.

[**82] Without actual numbers, compliance with--or enforcement of--the pecuniary [*930] terms of the Navajo court's orders would prove problematic at best. Read literally, the March 6, 2000 Order commanded that the fiscal operations of a Utah county government and a Utah special services district come to an abrupt halt unless and until those unspecified sums were disbursed to the plaintiffs. How the County and Health District defendants were to proceed, as a practical matter, in order to avoid the issuance of "warrants for the arrest of the defendants" for non-payment of those amounts was not explained. [47]

[**83] Finally, the March 6, 2000 Order further provided that "the plaintiffs are granted leave to seek

enforcement of this Order as appropriate in any Utah or federal Court where it will be enforce[d] pursuant to principles of comity and applicable law." (*Id.* at [2].) To that end, the plaintiffs commenced the above-captioned action in this court by filing a complaint on July 25, 2000. (*See* Complaint (Verified), filed July 25, 2000 (dkt. no. 1).)

VI. THE NATURE AND EXTENT OF NAVAJO SOVEREIGNTY

In remanding this action because "the district court should have performed a *Montana* analysis" of Navajo tribal court jurisdiction, the court of appeals noted that "'the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.'" *MacArthur, 309 F.3d at 1227, 1228* (quoting *Nat'l Farmers, 471 U.S. at 855-56*).

Defining the current scope and extent of the Navajo [**84] Nation's civil authority over non-Indians begins with Navajo inherent sovereignty, brought into sharper focus through examination of pertinent treaties and congressional legislation, which may confirm, augment or limit the Navajo Nation's inherent sovereignty; through analysis of the extent to which that sovereignty may have been diminished as a consequence of the "dependent" status of Indian tribes; and through practical consideration of how the Navajo Nation has actually exercised its powers, given the legal framework that exists. [48]

A. Inherent Navajo Tribal Sovereignty

Analysis of the jurisdictional question on remand thus begins with the nature and extent of inherent Navajo tribal sovereignty.

1. "Domestic Dependent Nations"

The *MacArthur* panel delineated the original source and inherent nature of Navajo tribal sovereignty: [**85]

> Long before the arrival of Europeans on this continent, tribes were self-governing political communities. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, [*931] *471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)*. As such, the tribes possessed the full attributes of sovereignty, which included "the inherent power to prescribe laws for their members and to punish infractions of those laws." *United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)*. Although "their incorporation within the territory of the United States, and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised," *id.*, this divestiture was not absolute. Today, tribes retain sovereignty of a
>
> > unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain

> their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id.

As Felix Cohen observed [**86] in his seminal work on the subject of federal Indian law, "Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1941); *see Wheeler, 435 U.S. at 322, 98 S.Ct. 1079.*

MacArthur, 309 F.3d at 1221-1222. The Supreme Court has likewise observed:

> As we have often noted, Indian tribes occupy a unique status under our law. At one time they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the

> individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America.

[**87] *National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)*(footnotes omitted). [49]

[**88] [*932] The unique status of Indian tribes under American law has been characterized in a variety of ways: "'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than "private voluntary organizations."'"; [50] "Indian tribes are 'distinct, independent political communities retaining their original natural rights' in matters of local self-government"; [51] "'They are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'"; Indian tribes endure as distinct "entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." [52]

However they may have been characterized in a particular case, in each instance the Supreme Court has acknowledged that Indian tribes still possess inherent powers of self-government rooted in their own historic sovereignty. So has our own court of appeals: "Indian tribes [*933] are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which [**90] they predate." *NLRB v. Pueblo of San Juan,*

276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). [53]

Felix S. Cohen's *Handbook of Federal Indian Law* articulated the classic synthesis of the scope and extent [**91] of Indian tribal sovereignty:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States, and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1942) (footnotes omitted); *accord Powers of Indian Tribes*, 55 I.D. 14, 22 (1934), *1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974* 445, 449.

Given these fundamental principles, an Indian tribe serves as [**92] "its own source of power."

> Thus a tribe's right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government. . . . The relevant inquiry is whether any limitation exists to *prevent* the tribe from acting within the sphere of its sovereignty, not whether any authority exists to *permit* the tribe to act. . .
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> .

William C. Canby, Jr., *American Indian Law in a Nutshell* 75 (4th ed. 2004) (emphasis in original; citations omitted). [54]

[**93] Since 1978, the Supreme Court has elaborated upon a theory concerning the extent to which the Indian tribes' authority [*934] over their "external relations" has been withdrawn "by implication as a necessary result of their dependent status." *United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)*; *see, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)*, and *Montana v. United States, 450 U.S. 544, 545 (1981)*, discussed *infra*. This "implicit divestiture" theory bears most heavily upon the scope of Indian tribal authority over non-Indians. Indeed, "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Wheeler, 435 U.S. at 326*. The full extent of implicit divestiture has yet to be determined, resulting in no small amount of uncertainty and confusion as to the scope of tribes' inherent civil authority over non-Indians, *e.g., Nevada v. Hicks, 533 U.S. 353, 121 S. Ct.*

2304, 150 L. Ed. 2d 398 (2001); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989), and leading to frequent [**94] litigation of that question in cases such as this one.

Nonetheless, it still remains true that "defined by Chief Justice Marshall as 'domestic dependent nations,'"

> Indian tribes have long been recognized under principles of federal Indian law as possessing the right to self-government, free of most state law strictures over their own territory and members. Tribal sovereignty thus protects and affirms the right of tribes to exercise criminal and civil jurisdictional authority over their own members. By virtue of their inherent sovereignty, tribes, as recognized and affirmed by Congress, exercise criminal jurisdiction over non-member Indians on their reservation as well. In addition, the tribes have also been recognized as possessing a limited degree of civil jurisdictional authority over all non-members, Indian or non-Indian, who enter the reservation . . . .

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 377-378 (5th ed. 2005). "Notwithstanding various congressional restrictions and judicial limitations 'on the right of reservation Indians to make their own laws and be ruled by them,'" Indian "tribal [**95] governments and law-making institutions are

flourishing throughout Indian country, mainly because of the commitment of Indians to one of the fundamental principles of federal Indian law, tribal sovereignty." *Id.* at 378 (citation omitted).

2. Inherent Tribal Powers

In practical terms, inherent sovereignty enables Indian tribes to exercise a wide range of specific powers of self-government, among them: the power to levy and collect taxes from members, and from nonmembers engaging in transactions involving the tribe or taking place on tribal lands, [55] the power to manage the use of [*935] their territory and resources by both members and nonmembers, [56] and to the power to regulate economic activity and land use within the reservation. [57] *See Duro v. Reina, 495 U.S. 676, 687-688, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).*

[**97] In a footnote to its 1978 opinion in *United States v. Wheeler,* the Court listed three examples of powers encompassed within Indian tribes' "right of internal self-government," in addition to the tribes' acknowledged authority to prosecute tribal members for criminal offenses:

> Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases, 203 U.S. 76, 27 S. Ct. 29, 51 L. Ed. 96, 42 Ct. Cl. 525* ; *Roff v. Burney, 168 U.S. 218, 222-223, 18 S. Ct. 60, 42 L. Ed. 442*; to regulate domestic relations among tribe members, *Fisher v. District Court, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106* ; cf. *United States v. Quiver, 241 U.S. 602, 36 S.*

> *Ct. 699, 60 L. Ed. 1196* ; and to prescribe rules for the inheritance of property. *Jones v. Meehan, 175 U.S. 1, 29, 20 S. Ct. 1, 44 L. Ed. 49; United States ex rel. Mackey v. Coxe, 59 U.S. 100, 18 How. 100, 15 L. Ed. 299.*

435 U.S. at 322 n.18. Wheeler involved a federal criminal prosecution, and nothing in Justice Stewart's opinion for the Court in *Wheeler* even hints that these examples were thought to delineate the full extent of Indian tribes' civil "'power of regulating their internal and social relations.'" *Id.*

Justice Stewart, quoting [**98] at some length from his *Wheeler* opinion, reiterated this same list of examples three years later in *Montana v. United States:*

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id., at 322, n. 18.* But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. . . .

Montana, 450 U.S. at 564 (citations omitted).

Montana's restatement of *Wheeler*'s examples of tribal powers has been reiterated [*936] by the Court

in more recent opinions as descriptive of the nature of inherent tribal sovereignty. *Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)*, referred to the *Wheeler* examples as "the Court's preface" to "the *Montana* rule's second exception," which is "key to its proper application[.]" *Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)*, in turn, [**99] elaborated upon *Strate*'s reference:

> In *Strate*, we explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members,' *520 U. S., at 459* (brackets in original), quoting *Montana, supra, at 564*." These examples show, we said, that Indians have "'the right . . . to make their own laws and be ruled by them,'" *520 U. S., at 459*, quoting *Williams v. Lee, 358 U. S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)*. See also *Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 386, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976)* (per curiam) ("In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on whether the state action infringed on the right of

> reservation Indians to make their own laws [**100] and be ruled by them" (internal quotation marks and citation omitted)). . . .

533 U.S. at 360-361. *Hicks* treats the *Wheeler* examples as *examples* of the Indian tribes' broader "'right . . . to make their own laws and be ruled by them,'" giving no indication that the examples themselves should be considered all-inclusive. [58]

In recent opinions defining the extent of inherent tribal sovereignty, [**101] the Court has sought guidance from "the published opinions of the Solicitor of the Department of the Interior," among other sources. *United States v. Lara, 541 U.S. 193, 206, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004)* (discussing *Duro v. Reina, 495 U.S. at 689-692*). Nathan Margold's oft-cited Solicitor's opinion, *Powers of Indian Tribes, 55 I.D. 14 (1934)*, enumerates a number of specific tribal powers as being among those "powers vested in any Indian tribe or tribal council by existing law," *25 U.S.C.A. § 476 (2001)*. In addition to the powers over criminal offenses, domestic relations, inheritance and tribal membership highlighted in *Wheeler*, Margold's opinion detailed the legal authorities recognizing the inherent powers of Indian tribes to determine their own form of government; to lay and collect taxes; to control, manage and protect tribal property; "to adopt police regulations governing the property and contracts" of tribal members; to regulate entry into tribal territory; and to exercise "plenary civil and criminal jurisdiction" through "the judicial powers of the tribe [that] are co-extensive with its legislative or executive powers. [**102] " *55 I.D.* [*937] *at 30-67, 1Opinions of the*

Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 455-476.

The earlier and more recent editions of Cohen's *Handbook* make similar enumerations of tribal powers, but even these authoritative texts do not exhaust the subject. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 126-149 (1942) ("*Handbook* (1942 ed.)"); [59] *Felix S. Cohen's Handbook of Federal Indian Law* 246-257 (Rennard Strickland, et al., eds. 1982) ("*Handbook* (1982 ed.)").

[**103] In its *Final Report* to Congress nearly thirty years ago, the American Indian Policy Review Commission observed:

> The question of jurisdiction of tribal governments has grown increasingly complex in recent years. Tribal governments are emerging from an essentially dormant period forcibly imposed upon them by Federal policies directed toward their ultimate destruction. The tribes are beginning to assert those governmental powers necessary to take their proper place in the role of governments within the United States. *The powers they are seeking to assert are no more and no less than those of any local sovereign of these United States.* The objectives they seek to attain are peace and tranquility within the reservation boundaries and economic independence which will permit them to operate free of the Federal purse strings without fear of termination.

1 American Indian Policy Review Comm'n, *Final Report* 153 (1977) (emphasis added). The Commission recommended that "the long term objective of Federal-Indian policy be the development of tribal governments into fully operational governments exercising the same powers and shouldering the same responsibilities as other [**104] local governments." *Id.* at 154.

Today, nearly three decades later, modern tribal governments routinely exercise civil governmental authority over a range of day-to-day activities, much like comparable state and local government entities. Tribal codes and ordinances govern subject matter ranging from agriculture to zoning, and tribal departments and agencies administer and deliver an expanding array of community services--from police, [*938] fire, and other emergency services to education, health, housing, justice, employment assistance, environmental protection, cultural preservation, land use planning, natural resource conservation and management, road maintenance, water and public utilities. Indian tribes fit squarely within the ranks of modern American civic bodies, sharing the common duty and responsibility to provide essential services to the people of the communities they serve. *See, e.g., Meyers v. Board of Education of San Juan Sch. Dist., 905 F. Supp. 1544 (D. Utah 1995)* (federal, state, local and tribal governments are each obligated to provide education for Navajo students).

Moreover, Congress has afforded tribal governments a significant role in federal [**105] environmental protection under legislation such as the Clean Air Act, [60] the Clean Water Act, [61] and the Safe Drinking Water Act, [62] which were amended to

authorize the Environmental Protection Agency to treat Indian tribes as states for the purposes of developing and enforcing their own tribal air and water quality standards, and to grant Indian tribes primary enforcement authority over aspects of safe drinking water enforcement. Tribal authority in these matters has consistently been confirmed by the federal courts. *See, e.g., City of Albuquerque v. Browner, 97 F.3d 415, 419 (10th Cir. 1996), cert. denied, 522 U.S. 965, 118 S. Ct. 410, 139 L. Ed. 2d 314 (1997); Montana v. United States Environmental Protection Agency, 137 F.3d 1135 (9th Cir. 1998); Arizona Public Service Co. v. EPA, 341 U.S. App. D.C. 222, 211 F.3d 1280 (D.C. Cir. 2000); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).*

As noted above, Interior Solicitor Margold's Opinion on *Powers of Indian Tribes* acknowledged that "the powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has the power to regulate . . . it necessarily has the power to adjudicated, through tribunals established by itself, controversies involving" the "fields of local government in which our analysis has shown that tribal authority endures. *In all these fields the judicial powers of the tribe are coextensive with its legislative or executive powers.*" *Id.*, 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 471 (emphasis added). "Unless this power is removed by explicit legislation or is given up by the tribe . . . exclusive tribal judicial jurisdiction over reservation affairs is retained." *Handbook* [**107] (1982 ed.) at 250 (footnote omitted); *see also Handbook* (1942 ed.) at 146. [63]

The Supreme Court has reaffirmed that "tribal courts are important mechanisms for protecting significant tribal interests." *United States v. Wheeler, 435 U.S. at 332* (footnote omitted). "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication [*939] of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).*

Such recognition has been accorded tribal courts even as they continue to develop and evolve as institutions. [64] As one respected commentator has [**108] observed:

> The tribal courts, while relatively young, are developing in leaps and bounds. For example, many tribes are working to revise their tribal constitutions and to codify their civil, regulatory, and criminal law to provide greater guidance and predictability in tribal justice. At the same time, tribes have expanded the use of traditional law. Many tribal codes now combine unique tribal law with adapted State and Federal law principles. The number of law-trained Native Americans has increased. Both State and Federal courts continue to recognize the tribal courts as important fora for resolution of reservation-based claims involving both Indians and non-Indians.Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts, 33 Tulsa L.J. 1, 1 (1997).*

> Tribal courts have demonstrated an exceptional capacity for growth in competence and sophistication in the last quarter century. They are currently hearing more cases of greater complexity and impact than ever before. As part of this process of significant change, tribal courts are crafting a unique jurisprudence of vision and cultural integrity. In other words, tribal courts [**109] are responding competently and creatively to federal oversight pressures and cultural values in order to synthesize the best of both traditions.

Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 Judicature 110 (Nov.-Dec. 1995). *See generally* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285 (1998)*; Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (1995); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the* [*940] *Field*, 21 Vt. L. Rev. 7 (1996); Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 110-138 (1983).

[**110] "'Indian sovereignty' can be defined as the exercise of the powers of self-government." [65] No enumeration by examples of specific powers can paint a complete portrait of the inherent sovereignty of Indian tribes. This summary of fundamental principles and inherent tribal powers offers an introductory overview, giving at least some sense of the true breadth of the subject. *See* American Indian Policy Review

Commission, *Final Report* at 103 ("The point . . . is not to enumerate all sovereign powers of Indian tribes, but simply to give examples for the purpose of showing that Indian tribes are in fact governments.").

Tribal sovereignty today finds at least as much meaningful definition in the growth, development and day-to-day functioning of effective tribal governments as it finds in the [**111] volumes of the law library. Far from being relics of a bygone era, Indian tribal powers bear the fine burnish of everyday use.

3. Tribal Sovereignty & Federal Indian Policy

Tribal self-government cannot thrive in a jurisdictional vacuum, and for many years it has been the expressed policy of both the President and the Congress that tribal self-government should thrive. Indeed, "our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. at 856* (citing *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-335, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)* (Federal Government "firmly committed to the goal of promoting tribal self-government"); *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n. 5, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)* ("Through various Acts governing Indian tribes, Congress has expressed the purpose of 'fostering tribal self-government.'"); *White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144, 100 S. Ct. 2578, 65 L. Ed. 2d 665 & n. 10 (1980)* (the "tradition of Indian sovereignty over the reservation and tribal members . . . as we have repeatedly recognized, [**112] . . . is reflected and encouraged in an number of congressional enactments demonstrating

a firm federal policy of promoting tribal self-sufficiency and economic development"); *Morton v. Mancari, 417 U.S. 535, 551-555, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)* (upholding *25 U.S.C. § 472* Indian employment preference as "reasonable and rationally designed to further Indian self-government"); *cf. Williams v. Lee, 358 U.S. at 223* ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.").

In *New Mexico v. Mescalero Apache Tribe*, decided one year after *Montana*, the Court observed that "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes," citing to a series of congressional acts, from the Indian Reorganization Act of 1934, *25 U.S.C. §§ 461 et seq.*, [66] through the Indian Self-Determination and Education Assistance Act of [*941] 1975, *25 U.S.C. §§ 450 et seq. 462 U.S. at 334-335 & n.17.* [67]

> We have stressed that Congress' objective of [**113] furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." . . . In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources *by both members and nonmembers*, . . . to undertake and *regulate economic activity within the*

> *reservation*, . . . and to defray the cost of governmental services by levying taxes. . . .

462 U.S. at 335-336 (emphasis added & citations omitted) (quoting *White Mountain Apache Tribe v. Bracker, 448 U.S. at 143* (footnote omitted)). With the "successful accomplishment of the federal purpose" to further tribal autonomy clearly in mind, the Court concluded that the Mescalero Apache Tribe's regulation of non-Indian hunting and fishing on its reservation left no room for concurrent regulation by the State of New Mexico:

> It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including [**114] its wildlife. As . . . conceded by New Mexico, the sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members *as well as nonmembers.* In *Montana v. United States*, we specifically recognized that tribes in general *retain this authority.*
>
> Moreover, this aspect of tribal sovereignty has been expressly confirmed by numerous federal statutes. . . .

Id. (emphasis added & footnotes omitted). [68]

[**115] Congress remains firmly committed to supporting tribal autonomy through the effective operation of tribal courts, no less than other aspects of tribal self-government. Congress is aware that "tribal courts play a vital role in tribal self-government . . . and

[it] has consistently encouraged their development." *Iowa Mutual, 480 U.S. at 14-15.* In addition to legislation supporting tribal self-government generally, such as the Indian Reorganization Act of 1934, the Indian Self-Determination Act of 1975, the Tribal Self-Governance Act of 1994, [69] or the Indian Tribal Regulatory Reform and Business Development Act of 2000, [70] Congress has enacted measures specifically aimed at supporting and encouraging the development and effective functioning of Indian tribal courts and justice systems.

[**116] [*942] The Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968), *codified at 25 U.S.C.A. §§ 1301-1303 (2001)*, reflected Congress' intent "to promote the well-established federal 'policy of furthering Indian self-government.'" *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)* (quoting *Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)).*

The Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978), *codified at 25 U.S.C.A. §§ 1901 et. seq. (2001)*, emphatically reaffirmed Indian tribal jurisdiction over child custody, adoption and child welfare issues, including the primary role of tribal courts in the exercise of tribal jurisdiction over the children of tribal members. *See 25 U.S.C.A. § 1911.* Congress further afforded tribal judicial proceedings involving Indian child custody "full faith and credit" to the same extent that federal and state entities "give full faith and credit to the public acts, records, and judicial proceedings of any other entity." *25 U.S.C.A. § 1911(d)(2001).* [71]

[**117] Following the Supreme Court's decision in *Duro v. Reina, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990)*, which held Indian tribes to be divested of inherent criminal jurisdiction over non-member Indians, Congress immediately amended the Indian Civil Rights Act to reaffirm each Indian tribe's inherent power to prosecute non-member Indians for crimes committed within its jurisdiction. *See* Pub. L. No. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (1990), *codified at 25 U.S.C.A. § 1301(2) (2001).* [72] In doing so, Congress did not delegate federal criminal authority to the tribes; by exercising its power to "relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority," Congress simply "adjust[ed] the tribes' status," reviving inherent tribal sovereignty and thereby overruling the *Duro* Court's reading of the "'judicially made' federal Indian law" of inherent tribal jurisdiction. *United States v. Lara, 541 U.S. 193, 196, 200, 205-207, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).* [73] Attributing the [*943] *Duro* ruling to the vicissitudes of federal Indian policy over the past two centuries ("Such major policy changes [**118] inevitably involve major changes in the metes and bounds of tribal sovereignty"), [74] the *Lara* Court observed that "Congressional policy . . . now seeks greater tribal autonomy within the framework of a 'government-to-government relationship' with federal agencies." *Id. at 202* (citing *Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22951 (1994)*; 19 Weekly Comp. of Pres. Doc. 98 (1983) (President Reagan reaffirming the rejection of termination as a policy and announcing the goal of decreasing tribal dependence on the Federal

Government); [75] *25 U.S.C. § 450a(b)* (congressional [*944] commitment to "the development of strong and stable tribal governments"); *Felix S. Cohen's Handbook of Federal Indian Law* 78-202 (Rennard Strickland, ed. 1982); William Canby, *American Indian Law in a Nutshell* 13-32 (3d ed. 1998)).

[**121] Three years later, Congress enacted the Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004, *codified at 25 U.S.C.A. §§ 3601 et. seq. (2001)*, creating an Office of Tribal Justice Support within the Bureau of Indian Affairs to provide technical assistance and training to Indian tribes for the development of tribal codes, court rules, court administration and case management systems, standards of conduct, and long-range planning, *25 U.S.C.A. § 3611*; and providing funding "for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribal governments," *25 U.S.C.A. § 3613*, with authorization for appropriations exceeding $ 58,000,000 for each of the fiscal years 2000 through 2007. *25 U.S.C.A. § 3621.* [76]

[**122] Similarly, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778, *codified at 25 U.S.C.A. §§ 3651 et seq. (2001)*, provides for the awarding of grants by the Attorney General to tribal justice organizations and non-profit entities for tribal justice training, technical assistance, criminal assistance and civil legal assistance to tribal courts and tribal justice systems, *25 U.S.C.A. §§ 3661-3663 (2001)*; it also authorizes grants and technical assistance to Indian tribes "to enable such tribes to carry out programs to support--"

(1) the development, enhancement, and continuing operation of tribal justice systems; and

[*945] (2) the development and implementation of--

(A) tribal codes and sentencing guidelines;

(B) inter-tribal courts and appellate systems;

(C) tribal probation services, diversion programs, and alternative sentencing provisions;

(D) tribal juvenile services and multi-disciplinary protocols for child physical and sexual abuse; and

(E) traditional tribal judicial practices, traditional tribal justice systems, and traditional methods of dispute resolution. [**123]

25 U.S.C.A. § 3681(a) (2001).

Each of these measures reflects Congress' firm commitment "to a policy of supporting tribal self-government and self-determination," *National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. at 856,* particularly through the continued development and operation of effective tribal courts.

The Executive Branch has consistently shared that same commitment to furthering tribal self-government. *See, e.g.*, Department of Justice Policy on *Indian Sovereignty and Government-to-Government Relations, 61 Fed. Reg. 29424 (June 10, 1996), current version available at* http://www.usdoj.gov/otj/sovtrb.htm; Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, dated September 23, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html (The Bush Administration "is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States. [**124] ").

As one recent commentary suggests, "There is reason to believe that the policy of Indian self-determination is more deeply entrenched than past congressional policies. In over fifty years, Congress's power over Indian affairs has been exercised almost exclusively to further tribal sovereignty and economic self-sufficiency." David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 225 (5th ed. 2005). The direct participation and input of Native Americans in shaping and implementing the policy supporting Indian self-determination through tribal self-government may have a great deal to do with the self-determination policy's stability and endurance. *See generally* Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2005); Vine Deloria, Jr. & Clifford Lytle, *The Nations Within: The Past and*

Future of American Indian Sovereignty (1984); *Indian Self Rule* (Kenneth R. Philp, ed. 1986); 1 American Indian Policy Review Comm'n, *Final Report* at 69-82.

Since the Indian Civil Rights Act in 1968, Congress has enacted no legislation limiting, restricting or diminishing Indian tribal jurisdiction, tribal [**125] sovereignty or autonomy. To the contrary, it has expressly disclaimed any such purpose. [77] So in fashioning the federal common law of tribal civil jurisdiction over non-Indians, any judicial reading of the policies of the "political branches" of the federal government must take into account these consistent congressional and Executive policies favoring tribal self-government and the effective operation of tribal courts. "Our cases have often recognized that Congress is committed to a policy of supporting tribal [*946] self-government and self-determination." *National Farmers, 471 U.S. at 856.*

B. *Oliphant, Montana* & Implied Divestiture of Tribal Sovereignty

In May of 1977, following a detailed examination of federal Indian policy, Indian tribal sovereignty and the jurisdictional interplay among federal, state, local and Indian tribal governments, the American Indian Policy [**126] Review Commission reported to Congress:

> There is an established legal basis for tribes to exercise jurisdiction over non-Indians.
>
> There has been a demonstrated need for the exercise of some tribal jurisdiction over non-Indians within Indian reservations.

> The multiplicity of circumstances and variance in resources and capabilities of the tribes makes it undesirable that Congress attempt to impose a uniform solution to the jurisdictional authority of Indian tribes.
>
> The administrative decisions, the judicial opinions and the authorities of tribes thus far asserted reflect a conservative approach to defining the parameters of jurisdiction and authority of tribal governments and that such case by case determination is preferable to attempting any legislative solution.
>
> The provisions of the 1968 Civil Rights Act supply safeguards and remedies to persons aggrieved by actions of tribal governments which are adequate to the concerns expressed by non-Indians at this time.
>
> In the event any substantial problem arises in the future, the Congress has ample authority to impose whatever legislative solution may be required.

1 American Indian Policy Review Comm'n, *Final Report* [**127] at 154. The Commission recommended that "no legislative action be undertaken by Congress in relation to tribal jurisdiction over non-Indians at this time." *Id.*

With the exception of the Indian Child Welfare Act of 1978, dealing with Indian child custody issues, [78] Congress did not enact general legislation addressing tribal civil or criminal jurisdiction over non-Indians,

leaving the law to develop on a case-by-case basis, consistent with the Commission's recommendation. It thus should not seem surprising that as Indian tribal self-government has flourished, and even more so in recent years, the Supreme Court "has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *National Farmers, 471 U.S. at 851* (footnote omitted). [79]

[**128] 1. ***Oliphant v. Suquamish Indian Tribe***

Following on the heels of the Commission's *Final Report*--and with no small amount of irony--the Supreme Court issued an opinion in March of 1978 that propounded a sweeping general rule drastically restricting the exercise of inherent tribal authority over non-Indians. In *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)*, the Court held that all "Indian tribes do not have inherent jurisdiction to [*947] try and punish non-Indians" for criminal offenses. *Id. at 212.* Rewriting the legal principles defining inherent tribal sovereignty, the *Oliphant* Court asserted that Indian tribes had been completely divested of inherent criminal authority over non-Indians as an implied consequence of their "dependent" status:

> Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See *Cherokee Nation v. Georgia, 30 U.S. 1, 5 Pet. 1, 15, 8 L. Ed. 25 (1831)*. But the tribes' retained powers are not such that they are limited only by specific restrictions

> in treaties or congressional enactments. As the [**129] Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*"

Id. at 208 (quoting *Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)* (emphasis supplied by the Court)). [80] Looking to historical materials largely pre-dating the modern federal policies favoring tribal self-determination, the *Oliphant* Court found support for its conclusion in "the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians," which albeit unwritten, "carries considerable weight." *Id. at 206* (citations omitted). [81]

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text *form the backdrop* [*948] *for the intricate web of judicially made Indian law*, cannot be interpreted in isolation but *must be read in light of the common notions of the day and the assumptions of those who drafted them. . . .*
>
> . [**130] . . .
>
> By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-

> Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Id. at 210. [82]

[**133] Two weeks later, in an oft-quoted passage from its opinion in *United States v. Wheeler*, the Court gave succinct expression to *Oliphant*'s reformulation of the law: "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or *by implication as a necessary result of their dependent status. Oliphant v. Suquamish Indian Tribe, ante,* p. 191." *Wheeler, 435 U.S. at 323* (emphasis added). Language this broad necessarily raised the question whether inherent tribal *civil* jurisdiction over non-Indians had been similarly withdrawn "by implication."

In *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*--cited by the court of appeals in this case--the Court expressly rejected the assertion that Indian tribes had likewise been completely divested of inherent *civil* jurisdiction over non-Indians within reservation boundaries: "For several reasons," the Court explained, "the reasoning of *Oliphant* does not apply to this case." *471 U.S. 845, 854, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).* [83]

> First, although Congress' decision to extend the criminal jurisdiction of the federal [*949] courts to offenses committed by non-Indians against [**134] Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.

Id. (footnote omitted). "Moreover," the Court continued, "the opinion of one Attorney General on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. Speaking of civil jurisdiction, Attorney General Cushing wrote:"

> "But there is no provision of treaty, and no statute, which takes away from the Choctaws jurisdiction of a case like this, a question of property strictly internal to the Chocktaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States.
>
> . . . .
>
> "The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Chocktaws.
>
> . . . .
>
> "Now, it is admitted on all hands . . . that Congress has 'paramount right to legislate

> in regard to this question, in all [*950] its relations. *It has legislated, in so far as it saw fit, by taking jurisdiction* [**135] *in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Chocktaw Nation.*" 7 Op. Atty. Gen. 175, 179-181(1855) (emphasis added).

Id. at 854-855 (emphasis in original & footnote omitted). "Thus," the Court concluded, "the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. . . ." *Id. at 855* (footnote omitted) (citing *Kennerly v. District Court of Montana, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971)*, and *Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)*); [84] *accord Handbook* (1982 ed.) at 253 ("The development of principles governing civil jurisdiction in Indian Country has been markedly different from the development of rules dealing with criminal jurisdiction"). [85]

[**137] Here, too, as explained below, "'there is no provision of treaty, and no statute, which takes away from the [Navajos] jurisdiction of a case like this,'" involving the exercise of Navajo civil jurisdiction over non-Indian litigants.

2. *Montana v. United States* & its Exceptions

Navajo civil jurisdiction over non-Indians likewise cannot be "automatically foreclosed" by *Oliphant* where the Court has expressly endorsed the exercise of tribal civil jurisdiction over non-Indians in at least two distinct sets of circumstances--the so-called "*Montana* exceptions"--even where the controversy arises on non-Indian fee land within Indian reservation boundaries:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra, at 223*; *Morris v. Hitchcock, 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030*; *Buster v. Wright, 135 F. 947, 950* [**138] *(CA8)*; see *Washington v. Confederated* [*951] *Tribes of Colville Indian Reservation, 447 U.S. 134, 152-154, 100 S. Ct. 2069, 65 L. Ed. 2d 10.* A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court, 424 U.S. 382, 386, 96 S. Ct. 943, 47 L. Ed. 2d 106* ; *Williams v. Lee, supra, at 220*; *Montana Catholic Missions v. Missoula County, 200*

U.S. 118, 128, 26 S. Ct. 197, 50 L. Ed. 398 - 129; *Thomas v. Gay, 169 U.S. 264, 273, 18 S. Ct. 340, 42 L. Ed. 740.*

Montana v. United States, 450 U.S. at 565-566 (footnote omitted).

According to the late Chief Justice William H. Rehnquist, author of the *Oliphant* opinion, the *Montana* opinion--not *Oliphant*--represents "the most exhaustively reasoned of our modern cases addressing" Indian tribes' "retained or inherent sovereignty." *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).* In praising *Montana*'s reasoning twenty years after Justice Stewart had penned that opinion for a six-member majority, [**139] the Chief Justice was speaking for a unanimous Court. *Accord Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997)* (Ginsburg, J., for a unanimous Court)("*Montana v. United States*, decided three years [after *Oliphant*] is the pathmarking case concerning tribal civil authority over nonmembers."); *Nevada v. Hicks, 533 U.S. 353, 358, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)* ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, which we have called the 'pathmarking case' on the subject, *Strate*, ..."). [86]

86 *Nevada v. Hicks* extended the *Montana* analysis to determine tribal regulatory and adjudicatory jurisdiction over the conduct of state game wardens in executing state-court and tribal-court search warrants at a tribal member's residence located on *tribally owned land* within

the boundaries of the Fallon Paiute-Shoshone Tribes' reservation in Nevada, in the course of the investigation of an off-reservation criminal offense. The *Hicks* majority opined that "the general rule of *Montana* applies to both Indian and non-Indian land," and that "the ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' It may sometimes be a dispositive factor." *533 U.S. at 360.*

In this case, the Navajo court found jurisdiction over the conduct of the nonmember County and Health District defendants involving the Montezuma Creek Clinic. "The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund," and the property remains in State ownership. *MacArthur, 309 F.3d at 1218.* Thus, this court need not decide how *Hicks'* application of the *Montana* analysis to what it called "Indian-fee lands," *533 U.S. at 363, 366, 370,* may affect the Navajo Nation's inherent civil authority over its own tribal lands.

[**140] *Atkinson Trading Co.* resoundingly reaffirmed "the framework set forth in *Montana,*" which "broadly addressed the concept of 'inherent sovereignty.'" *532 U.S. at 651* (quoting *Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997)).* [87]

[*952] Although we extracted from our precedents "the general proposition that the inherent sovereign powers of an Indian

> tribe do not extend to the activities of nonmembers of the tribe," *450 U. S., at 565*, we nonetheless noted in *Montana* two possible bases for tribal jurisdiction over non-Indian fee land. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Ibid.* Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id., at 566.*

532 U.S. at 651. Referring to the [**141] Court's opinion in *Strate v. A-1 Contractors, 520 U.S. 438 (1997)*, the *Atkinson* Court continued:

> Recognizing that *Montana* "immediately involved regulatory authority," we nonetheless concluded that its reasoning had "delineated--in a main rule and exceptions--the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.'" *520 U. S., at 453* (quoting *Montana, supra, at 565*). We accordingly held that *Montana* governed tribal assertions of adjudicatory authority over non-Indian fee land within a reservation. See *520 U. S., at 453* ("Subject to controlling provisions in treaties and statutes, and the

> two exceptions identified in *Montana*, the *civil authority* of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe'" (emphasis added) (quoting *Montana, supra, at 565*)).

Id. at 652. Atkinson Trading Co. applied *Montana* "straight up" in concluding that "because Congress has not authorized the Navajo Nation's hotel occupancy tax through treaty or statute, and because [**142] the incidence of the tax falls upon nonmembers on non-Indian fee land, it is incumbent upon the Navajo Nation to establish the existence of one of *Montana*'s exceptions." *Id. at 654.* [88]

[**143] In this case, if we give presumptive effect to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" on non-Indian fee land within the reservation, *450 U. S. at 565*, as the *Atkinson* Court did, *532 U.S. at 659*, we must accord no less authoritative force to *Montana*'s two express exceptions to that "general proposition." *Atkinson* warned that the exceptions cannot be read to "swallow the rule." *532 U.S. at 655.* [*953] Conversely, "*Montana*'s general rule that Indian tribes lack civil authority over nonmembers on non-Indian fee land," *id. at 654*, cannot fairly be read to swallow its "two prime exceptions." *Strate, 520 U.S. at 452.* [89]

[**144] Following the recent guidance of *Atkinson Trading Co. v. Shirley* and taking the *Montana* Court at its word--and, of course, there should be no reason to infer that the United States Supreme Court does not mean what it says--the two *Montana* "exceptions"

allowing for the exercise of inherent tribal sovereignty over non-Indians on non-Indian fee lands must be read to have some genuine substantive meaning and day-to-day practical significance in the lives of Native Americans and their tribes, bands and communities. [90]

[**145] 3. Civil Jurisdiction Over Non-Indians Reaffirmed

The Supreme Court, both before *Montana* and since, has repeatedly reaffirmed Indian tribes' civil authority over non-Indians doing business on the reservation, at least to the extent necessary to safeguard the interests of the tribe and its members.

> It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. *See, e. g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*; *Williams v. Lee, 358 U.S. 217, 223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)*; F. Cohen, Handbook of Federal Indian Law 253 (1982 ed.) (hereafter Cohen) ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction"). Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. See, *e. g., Brendale v. Confederated Tribes and*

Bands of Yakima Indian Nation, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989). As [**146] distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States, supra, at 565.*

Duro v. Reina, 495 U.S. at 687-688.

Tribal authority over the activities of non-Indians on reservation lands is an [*954] important part of tribal sovereignty. See *Montana v. United States, 450 U.S. 544, 565-566, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-153, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980); Fisher v. District Court, 424 U.S. [382,] 387-389, 96 S. Ct. 943, 47 L. Ed. 2d 106 [(1976)].* Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute . . . .

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); see Pela v. Peabody Coal Co., No. A-CV-18-89 (Navajo S. Ct. 09/28/1990), at P [29]("Consistent [**147] with congressional policy, tribal courts presumptively have civil jurisdiction over reservation activities unless affirmatively limited by

treaty or a federal statute. *[Iowa Mutual]* at 18; *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).*"). [91]

Montana itself acknowledged that "to be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montana, 450 U.S. at 565.* Currently, "Tribal assertion of regulatory [**148] authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them," *Nevada v. Hicks, 533 U.S. at 361* (citing *Merrion, 455 U.S. at 137, 142)*, as is also true of the assertion of the tribes' corresponding "adjudicative jurisdiction" over nonmembers. *Id. at 357-358* (citing *Strate, 520 U.S. at 453*). [92] Yet as recently reaffirmed in *Atkinson* and *Hicks*, *Montana* continues to stand for the proposition that Indian tribes' civil authority extends to regulate and adjudicate the interests of non-Indians who enter into a variety of "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or whose conduct or activities threaten, imperil or have "some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana, 450 U.S. at 565, 566* (citations omitted). Nor can these "*Montana* exceptions" fairly be read to apply only to some singularly "exceptional" case that somehow never seems to arise. [93] As Justice O'Connor explains:

> *Montana* and [**149] our other cases concerning tribal civil jurisdiction over nonmembers occupy a middle ground

> between our cases that provide for nearly absolute tribal sovereignty over tribe members, see generally *Williams v. Lee, 358 U.S., at 218-223*, and our rule that tribes have no inherent criminal jurisdiction over nonmembers, see *Oliphant v. Suquamish Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)*. *Montana* recognizes that tribes [*955] retain sovereign interests in activities that occur on land owned and controlled by the tribe, and provides principles that guide our determination of whether particular activities by nonmembers implicate these sovereign interests to a degree that tribal civil jurisdiction is appropriate.

Hicks, 533 U.S. at 391-392 (O'Connor, Stevens & Breyer, JJ., concurring). [21]

For now, at least, this court declines to view the post-*Montana* law of Indian tribal civil jurisdiction over non-Indians in purely Manichaean terms, *viz.*, as the mixed result of an attack by the realm of darkness on the realm of light – a theme that resonates throughout plaintiffs' briefing of the issues on remand. (*See* "Plaintiffs' Briefing on *Montana*" at 6-10; "Federalism and Article III Court Limitations" at 10-17; Memorandum in Support of Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment, filed February 28, 2003 (dkt. no. 504), at 9-11 ("PRO TRIBAL PRESUMPTIONS").)

United States v. Lara establishes that Congress may exercise its plenary power over Indian affairs to redefine the federal law delimiting tribal jurisdiction, "adjusting" or "relaxing" the implied divestiture of tribal powers over nonmembers essentially as it sees fit--as it did after *Duro v. Reina* in 1990--should it again choose to do so. *Lara* teaches that Indian tribes' external sovereignty that has been "withdrawn . . . by implication as a necessary result of their dependent status" simply lies dormant until it is reawakened at Congress's behest. *Lara* discarded the notion that *delegation* of power would be required to restore tribal powers impliedly divested in favor of legislative "adjustment" of the extent of the divestiture. *541 U.S. at 207*. Thus, if Congress finds that the *Montana* analysis frustrates its firm policy supporting tribal sovereignty and tribal courts, it can simply overrule *Montana* through legislation redefining the limits of tribal civil jurisdiction over nonmembers.

If the jurisdictional "presumptions" are broken, as plaintiffs insist, Congress can fix them.

[**151] C. Navajo Sovereignty & Self-Government

1. The Navajo Treaty of 1868

Concerning the authority of the Navajo Nation over its reservation including civil jurisdiction over disputes between tribal members and non-Indians, the United States Supreme Court had long since acknowledged that "Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since." *Williams v. Lee, 358 U.S. 217, 221, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)*.

> In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. State of Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts. . . .

[*956] *Id. at 221-222* (citations omitted) (quoting Treaty with [**152] the Navajo, dated June 1, 1868, articles 2, 13, 15 Stat. 667, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1015, 1016, 1019 (1904)). [35]

[**153] The Court reaffirmed this reading of the *1868 Treaty in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973)*:

> The beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868. The agreement provided, in relevant part, that a prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so

> authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 668.

411 U.S. at 173-174. "The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." *Id. at 174.* Recalling the discussion of the history of the 1868 [**154] Treaty in *Williams v. Lee,* [8] the *McClanahan* Court continued: "It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw, 280 U.S. 363, 367, 50 S. Ct. 121, 74 L. Ed. 478 (1930)." Id.*

> When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant *to establish the lands as* [**157] *within the exclusive sovereignty of the*

> *Navajos under general federal supervision.* It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law--including state tax law--to Indians on the Navajo Reservation. See *Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S., at 687, 690, 85 S. Ct. 1242, 14 L. Ed. 2d 165*; *Williams v. Lee, supra, at 221-222.*

Id. at 174-175 (emphasis added). [**155]

In examining the question of subject-matter jurisdiction over non-Navajos, the Navajo Supreme Court also begins with the Navajo Treaty of 1868:

> Prior to proceeding to the contemporary Indian affairs law rules on civil jurisdiction over non-Indians, we will first apply the Treaty of 1868 between the United States of America and the Navajo Nation. 15 Stats. 667. We do so because there are three foundations [**156] for jurisdiction in Indian law cases. Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation's treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation. We address the treaty issue first, because a treaty constitutes the United States' recognition of our jurisdiction. We will then address contemporary Indian affairs law principles of jurisdiction over non-Indians.

Manygoats v. Cameron Trading Post, No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000), at P [40], *available at* http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm.

> Article II of the Treaty, 15 Stats. at 668, begins with a boundary description and then says that "this reservation" is "set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them . . . ." Federal courts use this language as the basis for Navajo Nation civil jurisdiction. *Williams v. Lee, 358 U.S. 217, 221-223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)*; *Littell v. Nakai, 344 F.2d 486, 488 (9th Cir. 1965)*; [**157] *UNC Resources, Inc. v. Benally, 518 F.Supp. 1046, 1050 (D. Ariz. 1981)*.

Means v. District Court of the Chinle Judicial District, No. SC-CV-61-98 (Navajo S. Ct. 05/11/1999), at P [62]. [97] "While the entry of non-Indians is not specifically mentioned in the 'set apart for the use' article, federal courts have consistently held that this treaty language is the basis for Navajo Nation civil jurisdiction, including jurisdiction over non-Indians." *Manygoats*, at P [41].

Looking to the negotiations leading to the formation of the 1868 Treaty, the Navajo Supreme Court discerns additional support for Navajo autonomy and authority over its permanent homeland:

> These preliminary discussions are important to an understanding of the Treaty of 1868. They show that the Navajo negotiators, . . . raised many questions about the power and authority of the Navajos on their return to their homeland. [General [**158] William T.] Sherman's responses show that the Navajo negotiators raised many such questions, and while the questions may not have been written down, the replies show the Navajo concerns. Sherman guaranteed the right of political integrity for the Navajo Nation, along with full powers to maintain [*958] territorial integrity. He expected a democratic council with a chief executive. Both that council and the chief executive would have broad powers.

Arizona Public Service Co. v. Office of Navajo Labor Relations, No. A-CV-08-87 (Navajo S. Ct. 10/08/1990), at P 53. [98] In the language of the 1868 Treaty itself, the Navajo Supreme Court finds confirmation that "these are distinctly and solely Navajo lands," and "that the benefits of the treaty lands, including employment or the fruits of industry solely belong to the Navajo People," *id.* at P [55]; that the Navajo Nation holds "the general exclusion power which is said to be the source of a great deal of tribal authority," *id.* at P [57]; that "Article XIII provides that the Navajo Reservation is the 'permanent home' of the Navajos, implying all that goes with a home -- the right to keep it in good order," *id.* at P [58]; [**159] "therefore, using the Treaty of 1868, the Navajo Nation has the power to regulate non-Indian businesses," including those with whom it has

entered into leasing or other commercial arrangements, such as Arizona Public Service Company. *Id.* at P [72].

"The Treaty of 1868 did not fully define Navajo governmental power because of many reserved rights which are not enumerated in it." *Id.* at P [65]. Indeed, "no provision in the relevant treaties or statutes confers the right of self-government in general . . . upon the Tribe." *Wheeler, 435 U.S. at 327.* "But none of these laws *created* the Indians' power to govern themselves . . ." *Id. at 328* (emphasis in original). "It must always be remembered that various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan, 411 U.S. at 173.* [**160]

> It is an elementary foundation block of United States-Indian nation relationships that Indian nations are sovereign and derive their sovereignty from their preexistence to the United States and their dealings with the United States as independent sovereigns. When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they did not receive their lands and powers from the United States but only ceded lands and privileges to it. That is true of the Navajo Nation and must be remembered in connection with the Treaty of 1868.

Benally v. John, 4 Nav. R. 39, No. A-CV-27-81 (Navajo Ct. App. 05/05/1983), at P [34]. [99]

"Implicit in the Treaty of 1868," then, "is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government. *Williams v Lee, 358 U.S. 217, 221-222, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).* [**161] And, 'since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation.' *McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 175, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973)." Billie v. Abbott,* No. A-CV-34-87 (Navajo S. Ct. 11/10/1988), at P [26]. [100]

Far from limiting the inherent sovereignty of the Navajo Nation, the 1868 Treaty has consistently been read to recognize [*959] and reaffirm Navajo autonomy and to reinforce inherent Navajo authority over their permanent homeland on the Navajo Reservation, including the exercise in specific cases of tribal civil authority over non-Navajos living or conducting activities in Navajo country.

2. Subsequent Legislation Enlarging the Navajo Reservation

Subsequent Executive Orders and congressional legislation enlarging the Navajo reservation redefined and enlarged the boundaries of the [**162] Navajo Nation's territory, [101] but did so without diminishing "the exclusive sovereignty of the Navajos under general federal supervision" over their "permanent home" in any way. This is no less true of "An Act to Permanently Set Aside Certain Lands in Utah as an Addition to the Navajo Indian Reservation, and for Other Purposes," Act of March 1, 1933, ch. 160, 47 Stat. 1418 (1933), 5 Charles J. Kappler, *Indian Affairs: Laws*

and Treaties 326-327 (1941), *as amended by* Pub.L. No. 90-306, 82 Stat. 121 (1968) (the "1933 Act"), which added the Aneth Extension to the Navajo Reservation, including the lands located at Montezuma Creek where the plaintiffs' place of employment is located. [102] That statute enlarged the Reservation by re-drawing its boundaries, encompassing public lands as well as lands held by others. The "vacant, unreserved and undisposed of public lands within the areas" thus bounded were "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the [*960] Interior may see fit to settle thereon." *Id.* at § [1], 47 Stat. at 1418, 5 Kappler at 326. The State of Utah was afforded the opportunity [**163] to exchange "such tracts of school land within the areas added to the Navajo Reservation" for equivalent "in lieu" lands to be selected from among "unreserved and nonmineral public lands . . . within the State of Utah." *Id.* at § 2, 47 Stat. at 1419, 5 Kappler at 327. Further,

> Though no oil or gas was believed to be located on these lands, it was provided that should such mineral resources be produced in commercial quantities, "37 1/2 per centum of the net royalties accruing" therefrom derived from tribal leases shall be paid to the State of Utah: *Provided*, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah *in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.*" 47 Stat. 1418. The

> remaining 62 1/2% of the royalties generated by any such tribal mineral leases were, by implication, to go to the Navajo tribe.

United States v. Jim, 409 U.S. 80, 80-81, 93 S. Ct. 261, 34 L. Ed. 2d 282 (1972) (emphasis added). "To make the administration of these funds more flexible and to spread the benefits of the royalties [**164] more broadly among the Navajo community, the Congress enacted a statute in 1968 that directed the State to expend the 37 1/2% of royalties 'for the health, education, and general welfare of the Navajo Indians residing in San Juan County.' 82 Stat. 121." *Id. at 81.* These provisions bear directly upon this case because "The [Montezuma Creek C]linic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund." *MacArthur, 309 F.3d at 1218.* [103]

3. A Tale of Two Treaties: *Montana* & the 1933 Act

While the parcels in question are not, strictly speaking, Navajo *tribal* lands, (*see infra*, at n. 114), they likewise are not, strictly speaking, "non-Indian fee lands" in the same sense as the lands at issue in *Montana*. The 1933 Act did not create a jurisdictional "checkerboard" of Reservation land and non-tribal land holdings; it delineated a continuous Reservation boundary, bringing the lands thus encompassed "within the exclusive sovereignty of the Navajos under general federal supervision," *McClanahan, 411 U.S. at 175*, and within "Indian country" under *18 U.S.C.A. § 1151(a).*

In *Montana*, the Court considered the 1868 Treaty with the Crow Tribe, which like the 1868 Navajo Treaty, set apart a defined reservation for "the absolute and undisturbed use and occupation" of the Crow Tribe. *Montana, 450 U.S. at 548, 553-554, 558-559* (quoting the Treaty with the Crows, dated May 7, 1868, art. 2, 15 Stat. 649, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1008 (1904)). The *Montana* Court emphasized that the non-Indian lands at issue within [**167] the Crow Reservation existed as a consequence of the subsequent allotment of lands on that reservation by Congress. *Id. at 559.* Inherent tribal authority under the 1868 Treaty [*961] with the Crow Tribe, the Court reasoned, "could only extend to the land on which the Tribe exercises 'absolute and undisturbed use and occupation,'"

> And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, *25 U.S.C. 331 et seq.*, and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Montana, 450 U.S. at 559 (footnote omitted). Looking to the policy of the Allotment Acts--"the eventual assimilation of the Indian population . . . and the 'gradual extinction of Indian reservations and Indian titles,'" the *Montana* Court asserted that "that treaty

rights with respect to reservation lands must be read in light of the subsequent [**166] alienation of those lands." *Id. at 559 n.9, 561* (citations omitted).

Role of Tradition in the Navajo Judiciary Reemergence and Renewal, 19 Okla. City U. L. Rev. 141, 142 (1994); *see also* Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994).

But beginning in 1892,

> the federal government created an alternative to traditional means of dispute resolution on the Navajo Reservation: Courts of Indian Offenses. These courts had little real power. The judges were Navajos appointed by federal officials. [n.1] [1993] any of the judges had formal legal education. The operated under rules promulgated by the Commissioner of Indian Affairs and sometimes [illegible] their decisions. The courts primarily resolved petty criminal matters and seldom resolved civil disputes. Traditional [illegible] that has not [illegible]

[illegible]

[illegible]

two trial court judges . . . ." *Id.* at 37. The Council did so "for several reasons," among them, "[a] successful tribal court system would strengthen the developing tribal government vis-a-vis the communities by making [**1154] it the provider of law and order and the dispenser of justice." *Id.* at 37 (footnote omitted).

> External relations, however, were probably even a more important spur to action. Navajo leaders feared that, if they did not have a legal system modeled on Anglo-American law, the states would assume jurisdiction on the reservation. The case of *Williams v. Lee* highlighted the threat. A non-Indian trader sued a Navajo couple residing on the reservation in Arizona state court to enforce a debt. The Arizona Supreme Court upheld the state court's jurisdiction, and the Navajos appealed to the United States Supreme Court.

Id. (footnotes omitted). In *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), the Supreme Court reversed the judgment of the Arizona Supreme [*967] Court, holding that the Navajo tribal courts had exclusive jurisdiction over disputes arising out of consumer credit transactions between Navajos and merchants on the Navajo reservation. Noting that the Navajo tribe "has in recent years greatly improved its legal system," the Court concluded:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and

hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.

358 U.S. at 223 (citations omitted).

The Hedgpeth Navajo courts survived the *Williams* crisis in 1959 and have matured into the leading tribal court system in the country. "Today, in the vast Navajo landscape, home to more than 220,000 [**1961] people, the nation has seven district courts with 14 trial judges. Appeals can be taken to a three judge supreme court." Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 281-251 (2005). Currently, "The Navajo judicial system hears about 100,000 cases a year, of which 20,000 involve criminal charges." *Id.* It is "the most complex and sophisticated of Indian court systems." Wilkins, *The Navajo Political Experience* at 191, and provides both "a fair and familiar forum for non-Navajo persons and a culturally coherent body of laws and procedures for tribal members." Krakoff, *A Narrative of Sovereignty* at 1138 (footnote omitted).

"The Navajo courts have a distinguished history," and "have stood firm for the principle of separation of powers in the face of various assaults on judicial independence[.]"

> One of the basic tenets which derives from the doctrine of separation of powers is judicial independence. The judiciary's function is to render judgments and to enforce its judgments and orders. No other branch or office of the government may legally interfere with the judiciary's duty to render judgments and enforce judgments in any way. Likewise, [**187] no other branch, office, or entity of the government may influence a court with the intent of altering its decision. Outcomes of cases that are before the courts must be free of any form of political influence. . . . Justice for the Navajo people means the courts' decisions must be free of influence or pressure from the Executive and Legislative Branches.

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at P [23] (citations omitted).

The Navajo courts have also succeeded in incorporating more traditional methods of dispute resolution, resulting in a "unique melding of Anglo-American-style judicial systems and traditional Navajo customary law." Krakoff, *A Narrative of Sovereignty* at 1138 (footnote omitted). *See also* Tom Tso, *1992 Navajo Nation Code of Judicial Conduct: Moral Principles, Traditions, and Fairness in the Navajo*, 76 Judicature 15, 15 (1992) (overview of Navajo courts and the re-integration of Navajo [**188] customary law); Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, 32 Judges J. 8 (1993); Tom Tso, [**958] *The Process of Decision Making in Tribal Courts*, 31 Ariz. L. Rev. 225 (1989).

2. Jurisdiction of the Navajo Courts

As to civil causes of action, the *Navajo Nation Code* provides that "the District Courts of the Navajo Nation shall have original jurisdiction over . . . All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." Navajo Nation Code, tit. 7, § 253(B) (1995). The *Code* in turn defines the "territorial jurisdiction of the Navajo Nation" as:

> Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

Navajo Nation Code tit. 7, § 254 (1995).

These current provisions reflect the Navajo Nation Council's [**189] 1980 amendment expanding the jurisdiction of the tribal courts. The Council Resolution adopting the amendment noted that while the United States Supreme Court had limited tribal criminal jurisdiction over non-Indians, no such limitations had been imposed on tribal *civil* jurisdiction over non-Indians "within Navajo Indian country." Krakoff, *A Narrative of Sovereignty*, at 1138 (footnote omitted) (citing Res. of the Navajo Tribal Council, CF-19-80

(1980)). The resolution also made reference to the need for expanded access to the Navajo legal system: "Many non-Indians reside or do business or conduct other activities within the Navajo Nation (Navajo Indian country) and it is appropriate that these persons be called upon to account for their activities and the effect thereof in the courts of the Navajo Nation." *Id.* at 1139 (footnote omitted). The 1980 resolution amended Navajo Nation Code, tit. 7, § 253(B) to read as it does today. *Id.* Under § 253(B),

> The Navajo courts have civil jurisdiction over all persons who cause an action to occur in Navajo Indian Country. *Window Rock Mall v Day IV*, 3 Nav. R. 58, 59 (1981); *Deal v. Blatchford*, 3 Nav. R. 159 (1982); [**190] *Billie v. Abbott*, 6 Nav. R. 66 (1988). Navajo Indian Country is "defined as all land within the exterior boundaries of the Navajo Reservation . . . ." 7 N.T.C. § 254 (1985). Navajo Indian Country makes up the Navajo courts' territorial jurisdiction.

Taylor v. Bradley, No. A-CV-14-88 (Navajo S. Ct. 08/31/1989), at P [24].

3. Navajo Court Jurisdiction Over Non-Indian Defendants

"Navajo courts assert jurisdiction over disputes as broadly as permitted by federal law." Leider, *Navajo Dispute Resolution*, at 38.

> Our jurisdiction statute, 7 NTC Sec. 253 . . . provides for civil jurisdiction over all areas

> where the prior Navajo Tribal Courts of Indian Offenses had jurisdiction and those provided for by a resolution of the Tribal Council. Today we hold that there is *full civil jurisdiction over any person doing injury within the Navajo Nation* because of the inherent sovereignty of the Navajo Nation and because of the residual jurisdiction of the prior courts.

Deal v. Blatchford, 3 Navajo Rptr. 159, 160 P [20] (Navajo Ct. App. 1982) (emphasis added). [113] Remembering that "the source of authority for tribal courts is the inherent [*969] sovereignty [**191] of their respective tribes and not the United States," [114] and that "tribal court authority is coextensive with sovereignty of the Indian nation itself," [115] *Deal v. Blatchford* reasserted tribal court jurisdiction in the wake of *Oliphant* and *Montana:*

> By now there should be utterly no question regarding the right of the Navajo Nation to exercise civil jurisdiction over non-Indians. *Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); United States v. Mazurie, 419 U.S. 544, 557-558, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); Montana v. United States, 450 U.S. 554 (1981); Babbitt Ford Inc. v. The Navajo Indian Tribe*, No. CIV 80-686 PCT CAM (D. Ariz., July 14, 1981) ; *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).*

> Our tribal courts are courts of general jurisdiction, unlike the District Courts of the United States, which are creatures of Congress. As courts of general jurisdiction, the Navajo Courts exercise all jurisdiction which is not forbidden them. Therefore we will exercise general civil jurisdiction over all matters arising within the Navajo Nation. . . .

Id. at PP [27], [28].

And as the Navajo Supreme Court recently explained:

> [A] tribal court has subject matter jurisdiction over non-Indians from several sources. A tribe may exercise its broad inherent sovereignty over non-Indian conduct anywhere within its territory. *United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).* Federal and state statutes, regulations, and intergovernmental agreements may acknowledge or delegate tribal authority over non-Indians. *E.g.* Indian Child Welfare Act, *25 U.S.C. § 1901.* Treaties recognize some authority over non-Indians not otherwise within a tribe's inherent sovereignty. *Means v. Chinle District Court*, 7 Nav. R. 383 (1999). A tribe's authority as landowner provides additional authority over non-Indians who enter tribal lands. Cohen's Handbook of Federal Indian Law 252 (1982 Ed.).

Nelson v. Pfizer, Inc., No. SC-CV-01-02 (Navajo S. Ct. 11/17/2003), at P [20], *available at* http://www.tribal-institute.org/opinions/2003.NANN.0000002.htm. *Nelson* involved product liability claims against non-Navajo pharmaceutical manufacturers involving a prescription drug product that had been dispensed to and [**194] ingested by Navajos living on the reservation. [*970] The Navajo Supreme Court held that the district court erred when it applied *Montana* and its exceptions to determine its jurisdiction over claims arising out of injuries suffered on tribal land. [116] Acknowledging that "we have applied these exceptions to cases involving non-Indian fee land," *id.* at P [24] (citing *Manygoats v. Atkinson Trading Company, Inc.*, No. SC-CV-62-200 slip op. at 5-8 (August 12, 2003), and *In re Atkinson Trading Company, Inc.*, 7 Nav. R. 275, 282-287 (1997)), *Nelson* declined to extend *Montana* to delimit tribal jurisdiction over non-Indian conduct occurring or causing injury on Navajo tribal lands:

> The implications of *Montana* for the Navajo Nation's power over its territory are clear. A rule requiring the application of *Montana* to all land restricts judicial authority over non-Indian conduct. We take judicial notice of the fact that trust land and tribally-owned fee land comprise virtually all land within the Navajo Nation. There are many non-Indian actors who impact the Navajo Nation in various and significant ways that may escape the authority of the Navajo Nation if our courts [**195] are required to apply the *Montana* exceptions to every civil case involving non-Indians.

> Judicial resources would be stretched if every case brought against a non-Indian required a detailed analysis of the various consensual relationships or direct effects on the Navajo Nation merely to establish jurisdiction. Further, application of *Montana* to every civil case with a non-Indian defendant undermines the federal policy encouraging the development of tribal courts. See *Iowa Mutual Ins. Co. v. La Plante, 480 U.S. 9, 15, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)* ("Tribal courts play a vital role in tribal self-government . . . and the federal government has consistently encouraged their development.") (internal citations omitted). Finally, our responsibility to protect the sovereignty of the Navajo Nation counsels that we not surrender authority unnecessarily.
>
> Based on these considerations, and the explicit restrictions in *Montana* and later cases, including *Hicks*, we decline to extend *Montana* to activity on tribal land . . . . *Hicks* applies *Montana* in the unique situation where the sovereign interests of a state government enforcing state criminal law are at issue, and no further. [**196] We decline to extend *Hicks* beyond the United States Supreme Court's own limitation. . . .

Id. at PP [35]-[36]. [17] "Until *Hicks*, it was clear that the *Montana* test only applied when the non-Indian activity occurred on non-Indian owned fee land or on certain types of rights-of-way considered the equivalent of fee

land. . . ." *Id.* at P [29] (citations omitted). [118] *Nelson* reaffirms [*971] that, with the exception of *Hicks*' "unique situation," *Montana* applies only to "non-Indian fee lands," not tribal lands. [119]

> *Id.* at PP [35], [39] (footnote omitted). "The anomaly in treatment of state official defendants," the court explains, "arises from the U.S. Supreme Court's decision in *Hicks*. In that case the court applied *Montana* to state official activity on tribal land, there a trust allotment. *Hicks, 533 U.S. at 358*." *Id.* at P [40].
>
> Whether defendant Wood, as an officer of a local special services district, would be deemed a "state official" under *Dale Nicholson Trust* is not clear. Consistent with the court of appeals' mandate, this court's reading of *Montana* and subsequent cases, and a reading of *Dale Nicholson Trust* that embraces District officials among the "state officials" in "a special category of non-Indians for jurisdictional purposes" to whom *Montana* would always apply, this court has determined the Navajo court's subject-matter jurisdiction over Wood by applying *Montana*.

[**198] **4. *Montana* & the NPEA in the Navajo Courts: the *Manygoats* Case**

With the Navajo Nation's inherent sovereignty and provisions of the 1868 Treaty clearly in mind, the Navajo Supreme Court "proceed[s] to the contemporary test for civil jurisdiction over non-Indians, taken from *Montana v. United States, 450 U.S. 544 at 565-566 (1981)*, and applied in *Strate v. A-1 Contractors, 520 U.S. 438 (1997)*," in deciding questions of civil jurisdiction over non-Indian conduct on non-

tribal lands. *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000) ("*Manygoats I*"), at P [43], *available at* http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm.

For example, the *Manygoats* case applied the *Montana* analysis in deciding "whether the Navajo Nation has civil regulatory and adjudicatory jurisdiction over the employment practices of a New Mexico corporation conducting business on fee land within the territory of the Navajo Nation," (*id.* at P [40]), specifically whether [*972] the civil jurisdiction of the Navajo courts encompassed a wrongful discharge claim pleaded under the Navajo Preference [**199] in Employment Act by a Navajo plaintiff who had been fired from her job at the Cameron Trading Post: [120]

> Did the Trading Post enter into consensual relationships with the Navajo Nation or its members, through commercial dealing, contracts, leases, or other arrangements, or does the Trading Post's activities affect the Navajo Nation's political integrity, economic security, health, or welfare?
>
> In the case of *FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), cert. denied, 499 U.S. 943, 111 S. Ct. 1404, 113 L. Ed. 2d 459 (1991)*, the court upheld Indian nation jurisdiction over a business because of a variety of consensual commercial relationships, including mining leases and contracts, recognition of the Tribe's taxing power, royalty agreements, employment of members, and the location of

> a business facility within reservation boundaries. The same principles apply here.

Manygoats I, at P [40].

[**200] As to *Montana*'s first exception, *Manygoats I* found that "the 'consensual relationship' with Navajos is an employer-employee one, and employment is a contract. The Trading Post does business with Navajos, another form of consensual relationship, and despite disclaimers at the Commission hearing about the volume of business, it is clear that the Trading Post does have such consensual relationships." (*Id.* at P [45].) [121]

Manygoats I also found that *Montana*'s second exception applied to extend the Navajo Nation's civil authority over employment relationships [**201] involving Navajos at the Cameron Trading Post:

> The Navajo Nation retains the right and the duty to protect its members, the public at large, and its territory. The Navajo Nation Council recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6). Those are among the most important government powers generally, and it would be nonsense to assert that such authority is not an essential part of the Navajo Nation's powers. See, LITTLEFIELD & KNACK, NATIVE

AMERICANS AND WAGE LABOR (1996).

Id. at P [47]. [122] Exercise of jurisdiction over the Cameron Trading Post likewise [*973] comported with the uniform application of Navajo labor laws within the Navajo reservation, and specifically, within the Cameron community:

> Aside from the treaty and "*Montana* test" considerations, it would be senseless to conclude that the Navajo Nation cannot regulate labor relations at the Trading Post, when it clearly can regulate the employment practices of businesses just a few yards away near the Cameron Chapter House, all of which employ Navajos and are within Navajo [**202] Nation territory.

Id. at P [48]. *Manygoats I* concluded that the "Navajo Nation does have civil regulatory and quasi-judicial adjudicatory jurisdiction over the employment practices of Cameron Trading Post when it conducts business on fee land within the Navajo Reservation," *id.* at P [49], at least to the extent that the Trading Post employs Navajos.

On a second appeal after remand in the *Manygoats* case, the Navajo Supreme Court held that

> the Navajo Nation's regulation of Cameron's employment practices easily falls within the first exception, for Cameron has clearly entered consensual relationships with members of the Navajo Nation through

> employment contracts, [**203] by employing tribal members to provide services in exchange for mutually agreed upon wages. Its employment practices are, therefore, subject to the Navajo Nation's employment regulations.

Manygoats v. Atkinson Trading Co., Inc., No. SC-CV-62-2000 (Navajo S. Ct. 08/12/2003) ("*Manygoats II*"), at P [35]. [123] The court rejected the trading post's assertion that its employment of Navajos was not "consensual" because it was not free to discriminate against Navajos under Title VII of the Civil Rights Act of 1964, *42 U.S.C.A. §§ 2000e-1 et seq.*, and because "there are simply not enough non-Navajos in the area to permit Cameron not to employ Navajo workers," *id.* at P [36]:

> These rules and conditions may limit the range of choices available to contracting parties, but they do not negate the voluntary or consensual nature of otherwise legal contractual relationships. Since Cameron's employment relationships with its Navajo workers *are* consensual, the Navajo Nation's regulation of Cameron's employment practices falls within the first *Montana* exception.

Id. at P [40] (emphasis in original; footnote omitted).

[**204] In *Atkinson Trading Co. v. Shirley*, the United States Supreme Court pointed out that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *532*

U.S. at 656. The *Manygoats II* court addressed this requirement:In *Atkinson Trading Co. v. Shirley*, the United States Supreme Court pointed out that "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *532 U.S. at 656.* The *Manygoats II* court addressed this requirement:

> Moreover, the Navajo Nation's exercise of regulatory and adjudicatory jurisdiction over Cameron's employment practices satisfies the nexus requirement recently articulated by the U.S. Supreme Court in *Atkinson v. Shirley, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).* According to *Atkinson*, "*Montana*'s consensual relationship exception requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id. at 656.* Such a nexus clearly exists here. The regulation at issue is the NPEA, which governs the terms and conditions of *employment* of Navajo workers on the Nation's territory. The relevant consensual relationship [*974] is an *employment contract* between Cameron and its Navajo workers; therefore, the nexus requirement is met.

Manygoats II, at P [41] (emphasis in original). [**205] The *Manygoats II* court again held the second *Montana* exception to apply as well:

> We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation Council enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce. 15 N.N.C. § 602(A). Cameron is the major employer in the area surrounding the trading post, with 7% to 13% of the area's Navajo population working for Cameron at any given time. Most families living in the area rely either directly or indirectly on Cameron for their livelihood. Thus, Cameron's employment practices have a great, and potentially devastating, impact upon the welfare of the local community and economy. Therefore, they properly come within the scope of the Navajo Nation's civil authority.

Id. at P [44] (footnote omitted). [121]

> Moreover, the Navajo Nation's exercise of regulatory and adjudicatory jurisdiction over Cameron's employment practices satisfies the nexus requirement recently articulated by the U.S. Supreme Court in *Atkinson v. Shirley, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001)*. According to *Atkinson*, "*Montana*'s consensual relationship exception requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id. at 656*. Such a nexus clearly exists here. The regulation at issue is the NPEA, which governs the terms and

> conditions of *employment* of Navajo workers on the Nation's territory. The relevant consensual relationship is an *employment contract* between Cameron and its Navajo workers; therefore, the nexus requirement is met.

Manygoats II, at P [41] (emphasis in original). The *Manygoats II* court again held the second *Montana* exception to apply as well:

> We take judicial notice of the fact that Navajo Nation unemployment rates are very high. The Navajo Nation Council enacted the NPEA to ensure the economic growth of the Nation and the economic well being of the Navajo workforce. 15 N.N.C. § 602(A). Cameron is the major employer in the area surrounding the trading post, with 7% to 13% of the area's Navajo population working for Cameron at any given time. Most families living in the area rely either directly or indirectly on Cameron for their livelihood. Thus, Cameron's employment practices have a great, and potentially devastating, impact upon the welfare of the local community and economy. Therefore, they properly come within the scope of the Navajo Nation's civil authority.

Id. at P [44] (footnote omitted). [124]

[**206] The trading post's consensual employer-employee relationship with Navajo members [*975] in *Manygoats* plainly satisfies the *Atkinson* "nexus"

requirement, in contrast to the relationship between the non-Indian hotel enterprise and its "nonmember hotel guests" that was subject to the Navajo hotel occupancy tax at issue in the *Atkinson* case. *See* Krakoff, *A Narrative of Sovereignty*, at 1158 ("The tribal member's employment claim against Atkinson appears to fall squarely within the first *Montana* exception, which allows for tribal jurisdiction over contracts with tribal members, even in the post-*Strate* world of extremely narrow readings of this exception." (footnote omitted)).

The *Manygoats* opinions also grounded the assertion Navajo civil jurisdiction in the tribe's essential interest in the growth and regulation of employment on the reservation as activity having "some direct effect on . . . the economic security, or the health and welfare of the tribe." The development of the Navajo court system itself occurred in part as a response to the fundamental shift in emphasis in Navajo economics from livestock agriculture to a wage-earning economy since the 1950s. With [**207] "a total of 800 employers in Navajoland, including various BIA and governmental sectors," *Tiller's Guide* at 328, the need for some degree of local regulation of employment practices and protection of Navajo employees becomes readily apparent.

The *Manygoats* opinions bear directly upon the issues on remand in this case because they reflect the Navajo courts' view of the extent of Navajo regulatory and adjudicative jurisdiction to apply Navajo employment law to non-Indian employers who employ Navajos within the boundaries of the reservation, [125] both at the time when the three preliminary orders at

issue in this case were entered (*Manygoats I* was decided January 14, 2000), and at the present time.

[208] E. The Navajo Preference in Employment Act (NPEA)**

As the *Manygoats* court recognized, "Certainly, the Nation has an interest in [*976] fair employment practices, and it is one which we find to be essential to Navajo Nation government." *Id.* at P [59]. Safeguarding employment relationships becomes even more critical when jobs are scarce:

> Indian reservations usually have the highest rates of unemployment in the nation. Economic development on Indian reservations is therefore a high priority for Indian tribal governments and the federal government. In 1974, Congress passed the Indian Financing Act, *25 U.S.C.A. § 1451 et seq.*, "to provide capital on a reimbursable basis to help develop and utilize Indian resources, *both physical and human*, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources" and improve their standard of living. Pub. L. No. 93-262, § 2.

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 223 (5th ed. 2005) (emphasis added).

As *Manygoats I* explains, the Navajo Preference in Employment Act [**209] ("NPEA") was adopted because "the Navajo Nation Council found that the

NPEA was needed to protect 'the health, safety, and welfare of Navajo workers,' 15 N.N.C. § 602(A)(6)," *Manygoats I*, at P [57]; the Council expressly "recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6). Those are among the most important government powers generally . . . ." *Id.* at P [47]. The stated purposes of the NPEA are "to provide employment opportunities and training, promote economic development; lessen the Navajo Nation's dependence upon off-reservation sources of employment and income; foster economic self-sufficiency; protect the health, safety, and welfare of Navajo workers; and to foster cooperative efforts with employers to expand employment opportunities. 15 N.T.C. § 2.A. 1-7 (1990)." *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo 07/12/1994), at P [18], *available at* http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm.

In *Arizona Public Service Co.*, the Navajo Supreme Court upheld the validity of the NPEA as an exercise [**210] of tribal powers:

> We hold that the cited provisions of the 1985 Navajo Preference in Employment Act are valid exercises of the treaty powers, inherent powers, and police power of the Navajo Nation. The Navajo Nation has the power to enact legislation to regulate labor and employment, including provisions to protect the civil rights of workers.

Arizona Public Service Co. v. Office of Navajo Labor Relations, No. A-CV-08-87 (Navajo S. Ct. 10/08/1990), at P [31], *available at* http://www.tribal-institute.org/opinions/1990.NANN.0000003.htm.

1. "At-Will" Employment vs. "Just Cause" Tenure

Under Navajo labor policy as it existed prior to the enactment of the NPEA in 1985, it appears that the Navajo courts applied "the American rule, as harsh as it may be, . . . that an employee at will has no remedy for firing unless:"

> (1) The employee is tenured by contract;
>
> (2) The employee is tenured by practice of employment (i.e. the custom of the workplace);
>
> (3) The employee is protected by civil rights legislation or a constitutional guarantee;
>
> (4) The employee's firing violates protected speech policies;
>
> [*977] (5) Public policy has been violated (e.g. firing [**211] for refusing sexual advances by a supervisor or firing for filing a worker's compensation claim); or,
>
> (6) There is some other identifiable legal protection which has been breached.

Davis v. Navajo Tribe, 4 Nav. R. 50, at PP [15]-[21] (Navajo Ct. App. 05/12/1983), *available at* http://www.tribal-institute.org/opinions/1983.NANN.0000062.htm ; *see id.*

at P [23] (plaintiff "is an employee at will, who could be fired for any reason.").

The NPEA was adopted on August 1, 1985, by Navajo Tribal Council Resolution CAU-63-85, and is currently codified at Navajo Nation Code tit. 15, §§ 601-619(1995). The scope of the NPEA is considerably broader than its name might suggest:

> NPEA is *a general labor code*, and it supplanted the Navajo Nation labor policy adopted in 1958 (15 N.T.C. §§ 601-612 (repealed 1985)). The NPEA contains requirements that employers exercise preferential hiring practices in favor of Navajos, employment procedures, *just cause employment tenure*, health and safety guarantees, and training requirements. 15 N.T.C. § 604(b).

Arizona Public Service Co., No. A-CV-08-87, at P [20] (emphasis added). NPEA's "just cause" provision [**212] requires that "all employers shall not penalize, discipline, discharge, nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases." Navajo Nation Code tit. 15, § 604(B)(8)(1995).

In supplanting prior Navajo labor policy, the NPEA deliberately abandoned the "American rule" presuming at-will employment in favor of a rule establishing employment tenure based upon a "just cause" standard. As the Navajo Supreme Court recently explained:

> The purpose of the NPEA is clearly stated in the statute: "to protect the health, safety, and welfare of Navajo families." 15 N.N.C. § 602(A)(6). *The requirement of just cause for firing springs from this purpose, as it seeks to prevent wrongful terminations and maintain the welfare of Navajo families by keeping wage earners employed.* The Council reinforced and gave further weight to their intent with the following statement: "It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above." 15 N.N.C. § 602(B). The broad principles [**213] of family welfare written into NPEA by the Council, and the stated desire for the NPEA to accomplish these goals, means that Council intended to provide broad coverage to employees on the Navajo Nation, including necessary power for the Commission to set wrongful firings right through enforcement of back pay awards against employers not specifically excluded.

Tso v. Navajo Housing Authority, No. SC-CV-10-02, at P [32] (Navajo S. Ct. 08/26/2004), *available at* http://www.tribal-institute.org/opinions/2004.NANN.0000013.htm (emphasis added).

Like its other mandatory terms, the NPEA "just cause" requirement applies to "all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the

services of any person for compensation, whether as employee, agent, or servant." Navajo Nation Code tit. 15, § 603(C) (1995). All contractual "transaction documents" involving work "to be performed within the territorial jurisdiction of the Navajo Nation" are required to include [*978] a provision that the employer or contractor "affirmatively agree to strictly abide by all requirements of this Act[;]" as to contracts in which [**214] such express language is absent, "the terms and provisions of this Act are incorporated therein as a matter of law." Navajo Nation Code tit. 15, § 609(A) (1995). In the event of inconsistency or conflict between a contractual provision and the NPEA's requirements, the contractual provision "shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict." Navajo Nation Code tit. 15, § 609(A) (1995).

The Navajo Supreme Court has held the NPEA to apply to a wide spectrum of employers, both Navajo and non-Navajo, including an Arizona public utility, [126] a local school district, [127] a historic Indian trading post, [128] an Indian Health Service contractor, [129] as well as the Navajo Nation itself, including the Navajo courts. [130]

From and after its adoption of the NPEA on August 1, 1985, the Navajo Nation struck a new bargain with employers--itself included--for the benefit of Navajos working within the Nation's boundaries, guarantying each covered employee a greater degree of employment security than mere employment "at will."

As interpreted by the Navajo Supreme Court,

> At the very least, "'just cause' implies that the employer must have fair reasons for

taking adverse actions against an employee and that those reasons are supported by the facts of the case." *Dilcon* at 9. Indeed,

> not all employee misconduct will meet the standard for just cause. . . . The misconduct must be *substantial*. Thus, a minor neglect of duty, an excusable absence, a minor misrepresentation, rudeness, and even filing a defamation action against the employer have been held not [**216] to establish just cause.

Rothstein, et al., 2 Employment Law § 8.8 (2d ed., 2003) (emphasis in original; internal citations omitted).

Manygoats II, at PP [66]-[68] (quoting *Dilcon Navajo Westerner/True Value Store v. Jensen*, No. SC-CV-52-98, slip op. at 9 (Navajo S. Ct. 2000)). The NPEA also requires "written notification to the employee citing such cause for any" adverse employment action involving a covered employee "in all cases." Navajo Nation Code tit. 15, § 604(B)(8) (1995).

The just cause and notice requirements of NPEA reflect the obvious exercise of the Navajo Nation's acknowledged power to "make their own laws and be ruled by them," *Williams v. Lee*, even with respect to relationships with non-Navajo employers. There can be *no* meaningful conceptual difference between Navajo jurisdiction over the rights of individual Navajos as consumers of goods sold by non Navajos jurisdiction

expressly vindicated by the Supreme [*979] Court in *Williams v. Lee*--and Navajo jurisdiction over the rights of individual Navajos as employees of non-Indian employers working within the Navajo reservation boundaries. *358 U.S. at 220-223.*

2. NPEA [217] Protection for Non-Navajo Spouses**

Besides the tribal members covered by the Act, the NPEA also extends its protections to cover "non-Navajo spouses" of Navajo members:

> When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, *such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one-year period* immediately preceding the application for Navajo preference consideration.

Navajo Nation Code, tit. 15 § 614(A) (1995) (emphasis added). In addition to preference coverage, eligible non-Navajo spouses "shall also have and enjoy *all other employment rights granted to Navajos under the Act,* it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities." Navajo Nation Code, tit. 15 § 614(C) (1995) (emphasis added). "All other employment rights" would encompass, *inter alia*, the "just cause" and notice

requirements. *See* Navajo Nation Code, tit. 15 § 604(B)(8) [**218] (1995).

3. Administrative Enforcement of the NPEA

Direct enforcement of the NPEA begins with the Office of Navajo Labor Relations (ONLR): "When a violation of the NPEA occurs, a claimant can file a charge with ONLR. 15 N.T.C. § 10.B.1, 3 (1990)," or the ONLR may initiate an enforcement action on its own. *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo S. Ct. 07/12/1994), at P [19], *available at* http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm. "In this process, an investigation is then conducted by ONLR to determine whether there is probable cause to believe a violation of the NPEA has occurred. 15 N.T.C. § 10.C.1 (1990). A hearing will then be held by the Navajo Nation Labor Commission (NNLC). 15 N.T.C. § 11.C. (1990)."" *Id.* at P [20].

The Navajo Nation Labor Commission "has primary jurisdiction to determine compliance with the Act in a wrongful termination matter." *Office of Navajo Labor Relations v. West World*, No. A-CV-22-92, at P [33] (Navajo S. Ct. 4/18/1994), *available at* http://www.tribal-institute.org/opinions/1994.NANN.0000005.htm. Generally, then, NPEA claims must first be brought before the Navajo Nation [**219] Labor Commission (NNLC) before being filed in the Navajo district courts. Section 612(C) of the NPEA provides that "the person or party *in whose favor a Commission's decision providing for remedial action is entered* shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation *to enforce the remedial*

action; . . . ." Navajo Nation Code tit. 15, § 612(C) (1995) (emphasis added).

The "NNLC and ONLR have the authority to remedy NPEA violations. But these administrative agencies do not have the authority to redress violations of statutory law beyond the NPEA." *West World* at P [21]. "The question of whether a complainant is required to bring a claim before the NNLC implicates the doctrine of exhaustion [*980] of administrative remedies." *Id.* at P [22].

"Exhaustion of administrative remedies is the concept that administrative agencies should complete [their] procedures before the courts interfere." *Id.* NPEA enforcement is "a process which has been committed to the agency by the legislature and it should be allowed to run its course"; the exhaustion doctrine "prevents confusion that may arise if a party seeks relief in two forums; [**220] and requires parties to address their grievances without going to court." *Id.* at P [22] (citing *Navajo Skill Center v. Benally*, 5 Nav. R. 93, 96 (1986)).

Exhaustion of administrative remedies "is, however, not always required."

> It is not required if the administrative remedy is inadequate, which includes an unreasonable delay, inability to come to a decision, or lack of authority to grant the relief the party is entitled to. . . . Also, exhaustion of administrative remedies is not required if irreparable injury is imminent or the agency is acting in excess of its authority. . . . Thus, if the complainant

> alleges one of these exceptions, the complainant is not required to exhaust the agency's remedies.
>
> When the complainant is not required to exhaust the agency's remedies, he or she may file with a district court because those courts have general civil jurisdiction, which includes jurisdiction to hear claims raised under applicable federal laws. 7 N.T.C. §§ 204, 253 (1985).

Id. at PP [23]-[24] (citations omitted). The Navajo district courts "can hear NPEA claims if the parties have exhausted their administrative remedies or fall under one of the exceptions [**221] to the rule." *Id.* at P [26].

As to which forum, the district court or the NNLC, should determine whether the complainant's allegations fall under one of the exceptions to the exhaustion of remedies rule, the Navajo Supreme Court held in *Charles* that "'the NNLC must make that determination." *Id.* at P [27].

> Under the NPEA, the ONLR is given the specific responsibility of monitoring and enforcing the Act, 15 N.T.C. § 10.A. (1990), and to perform that duty, it must work closely with the NNLC--the administrative hearing body under the NPEA. The ONLR is also required to investigate and attempt to conciliate charges in which it finds that there is probable cause to believe the NPEA has been violated. 15 N.T.C. §§ 10.C., 10.F. (1990). To permit persons with employment

> claims to bypass this investigation and conciliation process and proceed directly to the courts would defeat one of the principle goals of the NPEA: "To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force." 15 N.T.C. § 2.A.7 (1990).
>
> There are considerations of judicial efficiency and economy as well. To allow complainants to immediately bring [**222] their claims to the district courts would overload an already overburdened Navajo Nation Court System. See, *PC&M Construction Co. v. Navajo Nation et al.*, No. A-CV05-93 (decided August 26, 1993). Furthermore, it would open the flood gates and encourage complainants to concoct claims outside the NPEA, in an attempt to circumvent the administrative process. Thus, the NNLC, the agency with expertise on NPEA matters, must initially determine whether the complainant is alleging valid claims of statutory violations outside of the NPEA.

Id. at PP [27]-[28].

Where complainants have initiated NPEA enforcement proceedings through [*981] the Office of Navajo Labor Relations, it is for the Navajo Nation Labor Commission to decide in the first instance whether the complainants are somehow excused from the exhaustion requirement, before an action seeking to enforce the NPEA may be brought in the Navajo district courts.

4. *Singer, et al. v. San Juan County, et al.* and the NPEA's Exhaustion Requirement

As the Navajo Supreme Court explained in *Charles v. Furniture Warehouse*,

> There needs to be a starting point in this process of determining the different aspects of [**223] employer-employee relationships. It is only reasonable to begin with the appropriate agency charged with the responsibility to oversee these matters. The Navajo Nation has a comprehensive and detailed plan that has regulations analogous to the National Labor Relations Board and covers the areas of concern to the working Navajo public similar to any federal and state employment statute, if not better. The Navajo Nation Council has charged the ONLR and NNLC with the responsibility to assure compliance with those laws. Thus, the process must be initiated with the ONLR and NNLC.

Charles, No. A-CV-18-93 (Navajo 07/12/1994), at P [30], *available at* http://www.tribal-institute.org/opinions/1994.NANN.0000004.htm. The Navajo Supreme Court reiterated the same point a year later in *Raymond v. Navajo Agricultural Products Industry* in affirming the dismissal of a Navajo employee's wrongful discharge lawsuit:

> Raymond should have sought an administrative remedy under the Navajo Preference in Employment Act (NPEA).

> According to the NPEA, "all employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. [**224] " 15 N.T.C. § 604B(8) (1990). A potential claimant can file a charge with the Office of Navajo Labor Relations, the agency responsible for the monitoring and enforcement of the NPEA. 15 N.T.C. §§ 610A and B (1990). NPEA provides for full enforcement and remedy in sections 10 through 12 (codified at 15 N.T.C. §§ 610-612 (1990)). Remedies available to plaintiffs are both prospective and retrospective. Appeal to the Navajo Nation Supreme Court is available to any party under the NPEA. 15 N.T.C. § 613A (1990). Raymond should have exhausted her administrative remedies before seeking relief in the courts. *Begay v. Board of Election Supervisors*, 2 Nav. R. 120, 125 (1979).

No. SC-CV-26-94 (Navajo S. Ct. 07/20/1995), at P [39], *available at* http://www.tribal-institute.org/opinions/1995.NANN.0000013.htm. It thus appears that by the time Riggs and Dickson's disputes with the Health District arose in 1999, the NPEA exhaustion requirement had become settled law in the Navajo courts.

In this case, while it appears that Singer, Riggs and Dickson each filed a complaint with the ONLR in early 1999, (*see* Pertinent Parts Navajo Ct. R. ("ONLR Complaint" & "ONLR App. For TRO" [**225] Tabs)), there does not appear to have been any disposition of

those complaints by the Navajo Nation Labor Commission prior to the commencement of *Singer, et al. v. San Juan County, et al.*, in April of 1999, or prior to the entry of the three orders now at issue in December of 1999 and March of 2000. The three orders make no reference to either the dismissal of the plaintiffs' ONLR proceedings or the entry of any Commission "decision providing for remedial action" based upon their complaints. And like the original Navajo court Complaint, [*982] the plaintiffs' "Complaint for Damages (Modified)," filed March 14, 2000, in *Donna Singer, et. al. v. San Juan County, et al.*, pleads that "all Labor Commission and Office of Navajo Labor Relations claims of the Plaintiffs will not be prohibited from being heard in this Court, *after such time as the plaintiff's employment claims have gone through their respective administrative process*," (*id.* at 4 P 18 (emphasis added)), suggesting that even after all three of the Navajo court orders had been entered, the plaintiffs' NPEA claims were still pending before the ONLR and the Labor Commission.

Keeping in mind that the NPEA vests [**226] "primary jurisdiction to determine compliance with the Act in a wrongful termination matter" in the Navajo Nation Labor Commission, *Office of Navajo Labor Relations v. West World*, No. A-CV-22-92 (Navajo S. Ct. 4/18/1994), at P [33], including the question whether the exhaustion of the NPEA's ONLR/NLCC administrative remedies will be required, *Charles v. Furniture Warehouse*, No. A-CV-18-93 (Navajo S. Ct. 07/12/1994), at P [27], the silence of the December 28, 1999 Order and the March 1, 2000 Order leaves unresolved the question whether that court had

jurisdiction under Navajo law to hear and determine the plaintiffs' NPEA claims.

The record now before this court suggests that it did not.

F. Navajo Tort Law

As summarized above, in the Navajo court proceeding, the Part II Plaintiffs pleaded tort claims of "wrongful hiring," defamation, "tortious interference with future contractual relations," intentional and negligent infliction of emotional distress, "theft," "violation of fiduciary duties," "misfeasance," and "malfeasance in office," at least three of which have been recognized as a basis for relief in the Navajo courts. As courts of general jurisdiction, [131] [**227] the Navajo district courts have subject matter jurisdiction over civil claims arising out of employment grievances, including causes of action for defamation, [132] infliction of emotional distress, interference with contractual relations, and denial of civil rights. *See, e.g., Manuelito v. Kellogg*, No. WR-CV-217-87 (Navajo S. Ct. 08/22/1989), at PP [13], [14], [17]-[20], [53] (citing Navajo Nation Code, tit. 7, § 253(2)), *available at* http://www.tribal-institute.org/opinions/1989.NANN.0000024.htm. And "the Navajo courts have jurisdiction 'over any person doing injury within the Navajo Nation . . . .' *Deal v. Blatchford*, 3 Nav. R. 159, 160 (1982); Accord, *Keith v. Allred*, 3 Nav. R. 191 (Chinle Dist. Ct. 1981)." *Billie v. Abbott*, No. A-CV-34-87 (Navajo S. Ct. 11/10/1988), at P [48], *available at* http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm. Indeed, "The Navajo Nation inherently has the authority to protect its members from fraud, deceit,

undue influence, overreaching, unconscionable conduct, torts and the other kinds of personal conduct the civil law is designed to regulate." *Benally v. John*, 4 Nav. R. 39, No. A-CV-27- [*983] 81 (Navajo [**228] Ct. App. 05/05/1983), at P [45]. [133] "Our courts have the authority to declare that a wrong has been committed and, in equity cases, to give an individual an order to correct the wrong. . . ." *Id.*

The question now [**229] before this court is whether on the facts in this case, Navajo adjudicative jurisdiction properly extended to reach the non-Navajo County and Health District defendants for purposes of these tort claims in light of *Montana* and more recently, *Strate v. A-1 Contractors*. As noted above, where "tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" *Strate, 520 U.S. at 453* (quoting *Iowa Mutual, 480 U.S. at 18*).

The Navajo Nation's inherent civil authority over employment relationships involving Navajo members includes the power to prescribe both statutory and common-law standards of conduct for employers and employees. Thus, as *Strate* indicates, we presume that the Navajo courts have civil jurisdiction over disputes arising out of those employment relationships. *See Manuelito v. Kellogg*, No. WR-CV-217-87 (Navajo S. Ct. 08/22/1989), at P [53].

As part of the acknowledged inherent power of Navajos "to make their own laws and be ruled by them," *Williams v. Lee, 358 U.S. at 220*; *Nevada v. Hicks, 533 U.S. at 361*, [**230] the Navajo Nation may also adopt legal standards of conduct that apply within its

territorial jurisdiction to protect the interests of Navajo members in their persons, property and relationships generally. The recent cases acknowledge this. *Nevada v. Hicks* noted that "there was little doubt that the tribal court had jurisdiction over such tort claims," *533 U.S. at 368*, referring to *El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999)*, a case involving Navajo plaintiffs' claims of injuries suffered as a result of the Uranium mining operations of non-Navajo companies. And the Navajo Nation's "right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court," in relation to non-Indian as well as tribal member plaintiffs. *Enriquez v. Superior Court, 115 Ariz. 342, 343, 565 P.2d 522, 523 (Ct. App.1977)* (holding that a tribal court had exclusive jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the Papago Reservation) (citing *Williams v. Lee, 358 U.S. at 220,* |**231| and *Fisher v. District Court of Sixteenth Judicial District, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976)).*

The Navajo courts have been developing their own body of Navajo common-law tort law, drawing upon both mainstream and traditional Navajo remedial concepts. *See, e.g.*, J. R. Mueller, *Restoring Harmony through Nalyeeh: Can the Navajo Common Law of Torts be Applied in State and Federal Forums?* 2 Tribal L.J. 3 (2001/2002), *available at* http://tlj.unm.edu/articles/volume 2/mueller/index.php; Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175 (1994); Daniel L. Lowery, *Developing a Tribal Common Law*

Jurisprudence: the Navajo Experience, 1969-1992, 18 Am. Indian L. Rev. 379 (1993). The Navajo Nation Council has also undertaken to incorporate traditional Navajo legal principles in its statutory codification. *See* Kenneth Bobroff, *Dine Bi Beenahaz 'aanii: Codifying Indigenous* [*984] *Consuetudinary Law in the 21st Century*, 5 Tribal L.J. (2004/2005), *at* http://tlj.unm.edu/articles/volume 5/ dine bi beenahazaanii codifying indigenous consuetudinary law in the 21st century/index.php.

Though the [**232] reported cases are few, it appears that where non-Indian defendants are involved, the Navajo courts assert the full extent of Navajo civil jurisdiction over conduct that "cause[s] an action to occur" or that results in an injury to Navajo members on tribal land, (*see supra*, note 116 & accompanying text), [134] and they apply *Montana* to determine their jurisdiction over non-Indian defendants involving conduct or injuries occurring on non-tribal, non-Indian fee lands within Navajo boundaries.

[**233] This approach comports with the Tenth Circuit case law applying the *National Farmers* exhaustion requirement to tort claims against non-Indians for conduct and injuries on tribal lands. In *Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1508 (10th Cir 1997), cert. denied, 522 U.S. 1090, 118 S. Ct. 880, 139 L. Ed. 2d 868 (1998)*, the court of appeals affirmed the district court's ruling requiring non-Indian defendants to exhaust tribal judicial remedies as to wrongful death and injury claims brought by tribal members in tribal court:

> We agree that strong tribal interests are implicated by these claims. The mill that

> allegedly produced the toxic and radioactive waste was located on the reservation pursuant to a lease with the tribe, and the alleged victims of the tort are tribal members residing on the reservation. *The tribal nexus is strong, as is the interest of the tribe as a sovereign in protecting and vindicating the rights of its residents,* as well as its interest as lessor of the land for the mill.

Id. at 1508. See also Navajo Nation v. Intermountain Steel Bldgs., Inc., 42 F. Supp. 2d 1222 (D.N.M. 1999) (reading *Kerr-McGee* [**234] as recognizing "that tribes retain a core sovereign interest in regulating the health and welfare of tribal members" through adjudication of tort claims in tribal court); *McDonald v. Means, 309 F.3d 530 (9th Cir. 2002)* (amended opinion); *Allstate Indemnity Co. v. Stump, 191 F.3d 1071, 1072 (9th Cir.1999).* [135]

[**235] [*985] That analysis bears upon this case for this reason: Riggs' defamation claim against Wood involves allegations of "fraud" that damaged Riggs' reputation among co-workers and others, causing injury to Riggs *on the Navajo Reservation. Nelson* indicates that the Navajo courts' civil jurisdiction applies to provide a Navajo tort remedy for this injury.

VII. ENFORCEMENT OF THE NAVAJO COURT ORDERS IN THIS FORUM

In remanding this case, the court of appeals stated:

> We are unwilling to enforce judgments of tribal courts acting beyond their authority,

> especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers, 471 U.S. at 851, 105 S.Ct. 2447*; *see Wilson, 127 F.3d at 810* (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law").

309 F.3d 1216 at 1225 (2002). On remand, this court must determine whether the Navajo Nation District Court had both subject-matter and personal jurisdiction over [**236] the [*986] County and Health District defendants for the purpose of adjudicating the Part II Plaintiffs' claims, and if so, whether and with what degree of recognition that court's orders must now be enforced against these defendants in this forum.

A. Theories re: the Navajo Court's Subject-Matter Jurisdiction in *Singer, et al. v. San Juan County, et al.*

"Key" to the Tenth Circuit's ruling in this case was "the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law"; according to the panel, "resolution of this question lies in *Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)* (defining the scope of tribes' inherent sovereignty)." *309 F.3d at 1218*.

1. Navajo Court Jurisdiction as a Federal Question

Generally, the scope of tribal court's jurisdiction over non-Indian litigants presents a federal question over which federal district courts have jurisdiction. *See National Farmers, 471 U.S. at 853*; *MacArthur, 309 F.3d at 1224*. In contrast to cases such as *National Farmers* [**237] and *Iowa Mutual*, this case was commenced in this forum by the tribal court *plaintiffs* rather than the tribal court defendants--a distinction the court of appeals thought may be significant:

> Although a tribal court *defendant* may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected against an unlawful exercise of Tribal Court judicial power," *Nat'l Farmers, 471 U.S. at 851, 852, 105 S.Ct. 2447*, this right to be free from tribal court interference does not necessarily support a federal claim seeking enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," *Wheeler, 435 U.S. at 323, 98 S.Ct. 1079*, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir.2002)* (en banc) (footnote omitted). To the [**238] extent appellants' complaint anticipates a defense arising under federal law, it runs up against the well-pleaded

> complaint rule. *See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908).*

309 F.3d at 1224-1225. The court of appeals also noted that "because we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well." *Id. at 1224 n.7* (citing *Fed. R. Civ. P. 57*; 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2767, at 650 (3d ed. 1998)). But the *MacArthur* panel declined to decide "whether such relief is available at this interlocutory stage of the parties' tribal court litigation." *Id.*

Since remand, the Part II Plaintiffs have asked that this court enforce the three Navajo court orders essentially "as issued," but they have also asserted that this court lacks jurisdiction under Article III of the Constitution to determine the subject-matter jurisdiction of the Navajo [**239] court that entered them:

> If Tribal Court jurisdiction is one of 'inherent sovereignty' under a Treaty, [*987] the supreme law of the land, (U.S. Constitution Article VI) under common law, then Congress is the one who defines jurisdiction. If Tribal Court jurisdiction is based upon a delegation of powers, then Article III courts have the say.

(Plaintiffs' Briefing on *Montana*, filed February 13, 2003 (dkt. no. 492), at 6.)

The scope of the subject-matter jurisdiction of tribal courts does not present a non-justiciable "political question" committed to the policy discretion of the Legislative or Executive Branches. Much of the existing legal authority defining the subject-matter jurisdiction of Indian tribal courts over non-Indian litigants such as the County and Health District defendants consists of "'judicially made federal Indian law," that is, federal case law precedent representing a species of "federal common law"--"which 'common law' federal courts develop as 'a "necessary expedient" when Congress has not "spoken to a *particular* issue."'" *Lara, 541 U.S. at 207* (quoting *County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233-237, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)* [**240] (quoting " *Milwaukee v. Illinois, 451 U.S. 304, 313-315, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981))* (emphasis supplied by Court)). As such, Congress, in the exercise of its "plenary and exclusive" power in Indian affairs remains free to "change 'judicially made' federal Indian law through . . . legislation," but unless and until Congress acts, this "intricate web of *judicially made* Indian law" remains among the "laws . . . of the United States" under which a "federal question" may arise within the meaning of *28 U.S.C.A. § 1331. Lara, 541 U.S. at 206* (quoting *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 at 206, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)* (emphasis supplied by Court)); *National Farmers, 471 U.S. at 857* ("*§ 1331* encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction").

As to the question "whether an Indian tribe retains the power to compel a non-Indian [litigant] to submit to the civil jurisdiction of a tribal court," the federal courts

likewise remain empowered and duty-bound under Article III to answer that question "by reference to federal law." *National Farmers, 471 U.S. at 852* (tribal jurisdictional question [**241] "is one that must be answered by reference to federal law and is a 'federal question' under *§ 1331*"); *Iowa Mutual, 480 U.S. at 16-20* (same jurisdictional query in case in *§ 1332* diversity jurisdiction).

That "federal question" is raised no less by an attempt to enforce a tribal court order in a federal forum than it is by an attempt to avoid its enforcement by resort to a federal forum, *National Farmers, 471 U.S. at 852*; *Iowa Mutual, 480 U.S. at 16-20*; *Strate, 520 U.S. at 443-445*; *Atkinson Trading Co., 532 U.S. at 648-649*; *Nevada v. Hicks, 533 U.S. at 356-357*, particularly where, as here, plaintiffs seek declaratory relief establishing that the orders are enforceable. (*See* Amended Complaint at 99 (citing *28 U.S.C. §§ 2201, 2202*).) Implicit in the recognition of tribal court judgments by federal or state courts as a matter of comity or full faith and credit is the question whether the tribal court had subject-matter and personal jurisdiction to render an enforceable judgment--which necessarily implicates the federal question identified in *National Farmers*. [**242] Though a plaintiff seeking enforcement of a tribal court judgment does not plead a cause of action created by federal law, the action nonetheless is one "arising under" federal law because it "turn[s] on substantial questions of federal law." *See* [*988] *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.,545 U.S. 308, 125 S. Ct. 2363, 2367, 162 L. Ed. 2d 257 (2005)*; [136] *cf.* Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M.L. Rev. 1 (2005).

[**243] **2. Subject-Matter Jurisdiction Over the County and Health District Defendants Under the *Montana* Exceptions**

The parties express drastically different views of the subject-matter jurisdiction of the Navajo Nation and the Navajo courts over the County and Health District defendants based upon the facts found--at least preliminarily--by the Navajo Nation District Court.

(*i*) Plaintiffs' Theory re: Jurisdiction

The Part II Plaintiffs submit that a series of congressional enactments beginning with the Indian Civil Rights Act of 1968 and "post dating *Montana v. United States*" create a "presumption OF tribal jurisdiction over non-Indians within Indian Country, without variation between Navajo and non-Indian . . . ." (Pltfs' Summ. Judg. Mem. (504), at 9.)

> Under . . . the clear and unambiguous language of statutes, this Court can sustain, under principals [sic] of full faith and credit, the Navajo Court Orders as an exercise of 'inherent sovereign' rights (***25 U.S.C. § 1301(2)***) to 'enact and enforce laws' (***25 U.S.C. § 3665***) within the confines of due process and equal protection to 'any person' (***25 U.S.C. § 1302*** [**244]) in 'Indian lands' the Tribes are 'responsible' for governing, as the 'most appropriate' Courts for resolving civil disputes in 'suits at law' (***25 U.S.C. § 1351***), based upon the Navajo Nation's right to enact and enforce their laws (***25 U.S.C § 3665(1), 3601, 3602***), for Indians and non-Indians alike. If the intent of Congress is

> clear and unambiguous, judicial inquiry stops. . . .

(*Id.* at 9-10 (emphasis in original; footnotes omitted)(citing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 98 S. Ct. 1670, 56 L. Ed. 2d 106 & n.21 (1978)).*) And any statutory ambiguity in this regard should be resolved by liberal construction, with "'doubtful expressions being resolved in favor of the Indians.'" (*Id.* at 11 (quoting *Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 39 S. Ct. 40, 63 L. Ed. 138, 4 Alaska Fed. 709 (1918)).* According to the plaintiffs, "Congress has determined [that] the Tribe's are responsible for the governance of Indian lands, and their courts are the 'most' appropriate forums for doing so." (*Id.* (citing *25 U.S.C.A. §§ 3601, 3602, 3651, 3665*).)
[3]

[**245] Plaintiffs' presumption thus becomes essentially irrebuttable--the cited statutes [*989] create the presumption either by their plain meaning or by liberal construction of any ambiguous terms, allowing for no contrary result. Plaintiffs assert as much, arguing that the presumption favoring tribal jurisdiction forecloses further judicial inquiry as to the extent of tribal jurisdiction:

> Since Congress has the authority over defining Tribal sovereignty, and has affirmatively acted to define the Tribal Court's jurisdiction over 'Indians and non-Indians alike,' and not affirmatively restricted the jurisdiction to only Indians, *the Court is bound to presume the jurisdiction* and enforce the Navajo Court

> orders as being within the Navajo Court's jurisdiction.

("Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492), at 10; *see also* Pltfs' Summ. Judg. Mem. (504), at 20 P 19 (same).)

Given this congressionally mandated presumption favoring tribal jurisdiction, plaintiffs openly dispute *Montana*'s "general proposition" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," *450 U.S. at 565*; [**246] "This presumption," plaintiffs contend, "is opposite Congress' presumption of Tribal Court jurisdiction" found in post-*Montana* legislation and "case law prior to the *Oliphant* 'inherent divestiture' theory . . . ." (*Id.* at 2-3.) [138] According to the plaintiffs, "This Court has no subject matter jurisdiction over a *Montana* briefing, since Congress has altered the presumptions under *Montana*, based upon inherent sovereignty and federal common law, placing the Navajo Orders in a position of being fully enforced within the fiduciary duty of the United States." (*Id.* at 5.) [139]

[**247] Plaintiffs' assertion that this court lacks subject-matter jurisdiction to determine the Navajo court's jurisdiction appears to be grounded in a misapprehension of the reasoning of *United States v. Enas, 255 F.3d 662 (9th Cir. 2001)* (en banc), *cert. denied, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888 (2002)*. Plaintiffs read *Enas* to say that "Tribal Courts' exercise of inherent sovereignty is not a 'Constitutional' issue where the *Courts* have the ability to restrict a Tribe[']s inherent sovereign authority, but one of federal common law wherein "*Congress [not the*

Courts] had the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law." Enas, at 669-71." (Pltfs' Cert. Pet. at 14 (emphasis in original).)

Enas considered whether the implicit divestiture of tribal criminal jurisdiction over nonmember Indians found in *Duro v. Reina* is a matter of constitutional interpretation not to be altered by subsequent legislation, or is a matter of federal common law, well within the power of Congress to change as it sees fit. *Enas* adopted the latter view, as did *United States* [**248] *v. Lara* three years later. [140] Nothing [*990] in *Enas*--or for that matter, in *Lara*--puts the question of the scope of Indian tribal jurisdiction over nonmembers out of the jurisdictional reach of the federal courts under Article III. It remains the justiciable "federal question" that *National Farmers* says it is. *Enas* and *Lara* simply indicate that if Congress is dissatisfied with the Court's delineation of the limits of tribal jurisdiction as a matter of federal common law, it may adjust those limits through further legislation, as it did in reviving tribal jurisdiction over nonmember Indians after *Duro v. Reina* in 1990.

[**249] Congress may "change 'judicially made' federal Indian law," and within constitutional limits, at least, the courts would be constrained to give effect to the legislative adjustment. [141]

[**250] The question raised by plaintiffs' "presumption" argument that this court must decide is whether such an "adjustment" has indeed occurred, displacing *Montana* as the governing law regarding Indian tribal civil jurisdiction over non-Indians.

(*ii*) San Juan County's Theory re: Jurisdiction

The San Juan County defendants assert that as to them, "the Navajo Tribal Court merely claims jurisdiction without any analysis or other support." (San Juan County Defendants' Memorandum Regarding [*991] Tribal Court Jurisdiction, filed February 20, 2003 (dkt. no. 499) ("Cnty. Juris. Mem."), at 5 P 13 (citing Deccember 28, 1999 Order).)

As to *Montana*'s "consensual relationship" exception, the County defendants submit that they did not enter into a consensual relationship with the Navajo Nation or its members: the IHS contract

> was between a federal agency and the Health Services District, not San Juan County. The land on which the clinic sits is fee land, owned by the State of Utah. It is not owned by San Juan County. San Juan County did not hire or employ the two tribal members left in this lawsuit, Riggs and Dickson. San Juan County did not hire Singer, a non-Indian. [**251] The only connection San Juan County Defendants have with the Health Services District, as pertaining to this specific lawsuit, is the creation of the San Juan Health Services District pursuant to *Utah Code Ann. §§ 17A-2-103, et seq.* In order to facilitate the delivery of medical care to residents of remote San Juan County. Once created, San Juan Health Services District became an independent entity . . . .

(*Id.* at 10.)

Concerning *Montana*'s second exception the County defendants submit that there was no conduct by the San Juan County Defendants at issue in this matter which would "threaten or have a direct effect on the political integrity, the economic security, or the health and welfare of the tribe," *Montana, 450 U.S. at 565*, because San Juan County Defendants did not operate the Montezuma Creek Clinic nor did they contract with anyone to provide Health Services to the Navajo Tribe." (*Id.*) They argue that they can be considered as "state actors" within the rationale of *Nevada v. Hicks*, and that "the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation," including [**252] the County's creation of the San Juan Health Services District pursuant to Utah law. (*Id.* at 11.) They also emphasize the non-tribal ownership of "the land on which the dispute arose": "[']**The absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction.**[']" (*Id.* (quoting *Hicks, 533 U.S. at 360* (emphasis supplied by County defendants).)

Concerning the County defendants sued individually, they argue that under *Nevada v. Hicks*, "it does not matter whether San Juan County Defendants were sued in both their personal and official capacity," because if tribal jurisdiction was to apply, ""'the operations of the [state] government may at any time be arrested at the will of the [tribe],'"" ostensibly an undesirable result. (*Id.* at 12 (quoting *Hicks, 533 U.S. at 365* (quoting *Tennessee v. Davis, 100 U.S. 257, 263, 25 L. Ed. 648 (1880)); see also Hicks, 533 U.S. at 365* ("We think . . . that the distinction between individual and official capacity suits is irrelevant.").)

The County defendants thus count themselves among those who can enter a reservation to enforce State [**253] laws without being subjected to the jurisdiction of the tribal courts for having done so, consistent with *Nevada v. Hicks*. *See Hicks, 533 U.S. at 365-366* ("Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation"); *id. at 358 n.2* ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.").

> [*992] The Navajo Tribe cannot regulate . . . the actions of the San Juan County Defendants when they act pursuant to Utah law or federal law. If the tribe cannot regulate these actions then, under *Nevada [v. Hicks]*, the tribe certainly does not possess jurisdiction over San Juan County Defendants for claims stemming from their performance of their duties under state law."

(Cnty. Juris. Mem. at 13.) Concerning defendant Halls, in particular, the County defendants submit that "tribal courts lack jurisdiction over state officials for causes of action related to the performance of official duties." (Cnty. Juris. [**254] Mem. at 14.) "In *Nevada [v. Hicks]*, the Supreme Court stated that 'state officials . . . are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in Tribal Court,' and Halls is a State official." (*Id.*

(citing *Hicks, 533 U.S. at 364*, and *Arnold v. McClain, 926 F.2d 963 (10th Cir. 1991)*). [142]

(iii) The Health District's Theory re: Jurisdiction

The Health District defendants assert that "plaintiffs cannot overcome the overwhelming presumption against the existence of subject matter jurisdiction in the Navajo Tribal Court," and that "contrary to plaintiffs' arguments, this Court has authority to determine the subject matter jurisdiction of the Navajo Tribal [**255] Court, and Montana continues to govern the subject matter analysis." (San Juan Health District Defendants' Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), at 2, 4.)

Beginning with *Montana*'s first exception, the Health District defendants argue that the plaintiffs cannot identify a "consensual relationship" within the scope of that exception: plaintiff Singer's employment with the District was not "with the Tribe or its members" because Singer is not a Navajo member; and as to Riggs and Dickson, "the consensual relationship is inapplicable because" according to *Nevada v. Hicks*, "the exception covers only private commercial relationships, and it cannot be extended to the official actions of governmental officials and employees." (San Juan Health District Defendants' Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497)("Dist. Summ. Judg, Mem."), at 10 (citing *Hicks, 533 U.S. at 359 n.3*).)

And the District relies on *Montana Dept. of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999)*, which

held that a tribe lacked [**256] jurisdiction to enforce its employment preference requirements against a state agency that had detailed crews of its existing employees to perform highway maintenance on state rights-of-way traversing the reservation. The State right-of-way did not involve a consensual relationship under *Montana*, the Ninth Circuit concluded, because "transfers of property interests between governmental entities create property rights; they generally do not create continuing consensual relationships." *191 F.3d at 1113* (citations omitted). The second *Montana* exception also did not apply because tribal control of state highway maintenance "was not necessary to preserve the right of the tribe to 'make their own laws and be ruled by them.'"

> The Community agreed to the right of way, and the State of Montana became [*993] responsible to maintain the road at its own expense. Thus, the Community's assertion of authority over the State's own employees goes beyond the "internal functioning of the tribe and its sovereignty" and instead impinges on one of the State of Montana's sovereign responsibilities--maintaining Highway 66 and the right of way at its own expense.

Id. at 1114. [**257] The Health District defendants argue that "like the highway in King, the Health District's Montezuma Creek Clinic was located on non-Indian land and was operated as a service to County residents." (Dist. Summ. Judg. Mem. at 12.)

As to *Montana*'s second exception, the Health District defendants submit that the exception requires more than "a showing that the safety of tribal members has been jeopardized," citing *Strate, 520 U.S. at 458-459*, and that "plaintiffs' claims have absolutely nothing to do with internal tribal self-government"--as exemplified by *Montana*'s examples of tribal powers -- "but rather address their own treatment as individuals and the alleged treatment of certain patients at the Clinic." (*Id.* at 13.)

B. Analysis & Conclusions re: the Navajo Court's Subject-Matter Jurisdiction in *Singer, et al. v. San Juan County, et al.*

1. *Montana* & the Plaintiffs' "Congressional Presumption"

The Part II Plaintiffs would reconcile the existing case precedent concerning tribal jurisdiction over non-Indians with the current federal policies encouraging tribal self-determination by simply discarding the case law and keeping the [**258] policies.

In *Lara*, the Supreme Court validated the essential premises underpinning the plaintiffs' "congressional presumption" theory, *viz.*, that Congress may rewrite the federal law of Indian tribal jurisdiction over nonmembers through simple legislation, and may "remove the restrictions on the tribes' inherent authority" without any need to delegate federal authority to the tribes. *Lara, 541 U.S. at 207.* "*Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy, nor do they suggest that the Court should second-guess the political branches' own determinations." *Id. at 205.* *Lara* did not read *Montana*, *Duro* or other cases "as

holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation." *Id. at 207.*

The question pressed upon this court by plaintiffs' argument is whether Congress through more recent legislation has in fact "relax[ed] the restrictions imposed by the political branches on the tribes' inherent [civil] authority" articulated in *Montana* and its progeny, as plaintiffs now insist.

[**259] The post-*Montana* legislative acts cited by plaintiffs include the Indian Tribal Justice Act of 1993, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and Pub. L. No. 101-511's amendment to *25 U.S.C.A. § 1301(2) (2001)*, relaxing the implied restrictions on tribal criminal jurisdiction over nonmember Indians delineated in *Duro*. As we have already seen, these examples of recent legislation are framed in terms firmly supportive of tribal self-government and effective tribal court systems. (*See supra* at 64-73.) The legislative history of the 1993 Act cited by plaintiffs reflects this policy, *see* H.R. Rep. No. 103-205, at 5-31 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2425-2452; H.R. Conf. Rep. No. 103-383, at 9-14 (1993); *see also* [*994] S. Rep. No. 103-88 (1993); so does the legislative history of the 2000 Act. *See* S. Rep. No. 106-219 (1999); H.R. 106-819, Part 1(2000). For example, in its 1993 Report, the Senate Committee on Indian Affairs observed:

> Tribal justice systems are critical to the maintenance and enhancement of the inherent and delegated sovereignty of tribal governments. Except when the Congress has established [**260] that federal

> jurisdiction is exclusive, tribal courts hear cases on virtually all aspects of governmental and private activity. The scope of tribal court jurisdiction is now becoming better understood, as several Supreme Court rulings and numerous federal court decisions have acknowledged by holding that exhaustion of tribal court remedies is required before appeals involving the exercise of jurisdiction by a tribal court can be made to federal court. In addition, when federal courts do review decisions of tribal courts, they employ the same standard of review that is applied in reviewing federal district court decisions. *FMC v. Shoshone Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).*
>
> It is the Committee's view that strong tribal justice systems are necessary both as a function of the exercise of tribal sovereignty and as a means to assure the fair and just administration of the laws enacted by tribal governing bodies and laws enacted by the Congress that require implementation by tribal governments. . . .

S. Rep. No. 103-88, at 3, 1993 WL 304728 (1993).

Yet these Acts do *not* enact into positive law any language explicitly reviving inherent [**261] tribal civil authority over non-Indians beyond the limits now set by *Montana, Strate, Atkinson*, and *Hicks*.

The 1990 amendment to *25 U.S.C.A. § 1301(2)* enlarged the definition of tribal "powers of self-

government" to mean "the inherent power of Indian tribes, hereby recognized and affirmed, *to exercise criminal jurisdiction over all Indians*," but it did not add the phrase "to exercise civil jurisdiction over all *persons*," or "over all members and nonmembers," or the like--which plainly would have achieved the result that plaintiffs now urge. *25 U.S.C.A. § 1301(2) (2001)* (emphasis added). [143]

This may explain why the Court did not address these statutes in deciding *Atkinson* or *Hicks*, and why no federal court of appeals to date, at least, has held that either or both of these Acts impliedly limited or overruled *Montana* and *Strate*. Nor does the legislative history suggest that Congress intended to "adjust" or "relax" the limitations on tribal civil jurisdiction over non-Indians prescribed by *Montana* or *Strate*. The committee reports say nary a word on the subject, and several make no reference to either *Montana* or *Strate*. *See* H.R. Rep. No. 103-205, at 5-31 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2425-2452; H.R. Conf. Rep. No. 103-383, [*995] at 9-14 (1993); S. Rep. No. 103-88 (1993); S. Rep. No. 106-219 (1999); H.R. 106-819, Part 1(2000).

In Section 2 of the Indian Tribal Justice Act of 1993, Congress made express findings concerning the importance of tribal courts:

> (5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

> (6) Congress and the Federal courts [**263] have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights; . . .

25 U.S.C.A. § 3601 (2001). The Senate Committee on Indian Affairs explained the significance of these findings:

> Finding (5) was added to reflect the decision of the United States Supreme Court in the case of *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981),* with regard to the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority.
>
> Finding (6) was added to emphasize that tribal courts are permanent institutions charged with resolving the rights and interests of both Indian and non-Indian individuals. The language tracks similar language of the Supreme Court in its ruling in *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978),* in which the Court stated that "tribal courts have repeatedly [**264] been recognized as appropriate forums for the exclusive adjudication of disputes affecting important

personal and property interests of both Indians and non-Indians,", *Id. at 65.*

This recognition of tribal court jurisdiction and authority is found in numerous other rulings of the Supreme Court and the federal courts, See e.g., *Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10, (1987)*:

> "although the criminal jurisdiction of the tribal courts is subject to substantial limitation, their civil jurisdiction is not similarly restricted." *Id. at 15*;
>
> adjudication of reservation affairs "by any non-tribal court *** infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Id. at 17*; . . .

S. Rep. No. 103-88, at 8, 1993 WL 304728 (1993). Given this reading of *Montana*, *Martinez* and *Iowa Mutual*, Congress likely saw no need to alter the legal framework established by those cases.

The 2000 Act incorporated Findings 5 and 6 in its own legislative findings, nearly verbatim, without further explanation. *See 25 U.S.C. § 3651* [**265] *(5), (6) (2001).* [144] In discussing "Civil Legal Matters," the Senate Committee on Indian Affairs made no reference to jurisdictional questions. S. Rep. No. 106-219, at Part

B (1999). The House Committee Report was silent on the subject as well. H.R. Rep. No. 106-819 Part 1 (2000).

[*996] Some scholarly commentary has suggested a legislative "fix" for the implied divestitures by *Oliphant* and *Montana*, [145] but this court has yet to find any commentary asserting that such a fix has already been accomplished by the existing legislation.

[**266] *Lara* certainly "gives the green light" to further consideration of such legislative "adjustment" by the Congress, and clearly indicates that if Congress "enact[s] a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes," then "that fact makes all the difference." *541 U.S. at 207*. But absent a new statute, this court must follow the law as propounded by controlling Supreme Court precedent, consistent with the court of appeals' mandate in this case, and exercise its jurisdiction over "federal questions" under Article III to determine the reach of Navajo tribal civil jurisdiction over the defendants in this case.

2. The Defendants' Reading of *Montana*

The County defendants' reading of *Montana*--and even more so, *Nevada v. Hicks*--suggests at least some yearning for the relative simplicity of a "bright line" test for the reach of tribal civil jurisdiction, such as land status, [146] or status as a State or local government official. [147] In a similar vein, the Health District defendants read *Hicks* to say that *Montana*'s "consensual relationship" exception "covers only private, commercial [**267] relationships, and cannot be extended to the official actions of governmental (Health District) officials and employees," [148] but this seems to read *Hicks* more broadly that *Hicks* read

itself: "Our holding in this case is limited to the question of tribal-court jurisdiction *over state officers enforcing state law*," thus leaving open 'the question of tribal-court jurisdiction over nonmember defendants in general," *Hicks, 533 U.S. at 358 n.2* (emphasis added), and likewise leaving open the question of tribal jurisdiction over state officials not directly engaged in law enforcement activity: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id. at 373. Hicks* expressly stops short of insulating any general category of nonmember conduct from tribal civil jurisdiction beyond its deliberately narrow holding as to state law enforcement officers executing search warrants in investigating an off-reservation offense.

Both Justices Ginsburg and Souter (joined by Justices Kennedy and Thomas) [*997] recognized this limitation of the *Hicks* Court's holding in their concurring opinions, *533 U.S. at 375-76* (Souter, Kennedy & Thomas, JJ. concurring); *id. at 386* (Ginsburg, J. concurring), with Justice Ginsburg penning a separate concurrence to make this precise point:

> I join the Court's opinion. As the Court plainly states, and as Justice Souter recognizes, the "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." *Ante, at 358, n. 2* (opinion of the Court); *ante, at 376* (Souter, J., concurring).

> The Court's decision explicitly "leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general," *ante, at 358, n. 2*, including state officials engaged on tribal land in a venture or frolic of their own, see [**269] *ante*, at 19 (a state officer's conduct on tribal land "unrelated to [performance of his law-enforcement duties] is potentially subject to tribal control").
>
> I write separately only to emphasize that *Strate v. A-1 Contractors, 520 U. S. 438 (1997)*, similarly deferred larger issues. *Strate* concerned a highway accident on a right-of-way over tribal land. For nonmember governance purposes, the accident site was equivalent to alienated, non-Indian land. *Id., at 456.* . . . But we "express[ed] no view on the governing law or proper forum" for cases arising out of nonmember conduct on tribal land." *Id., at 442*. The Court's opinion, as I understand it, does not reach out definitively to answer the jurisdictional questions left open in *Strate*.

533 U.S. at 386 (Ginsburg, J., concurring). Nor was the point lost on our own court of appeals. *MacArthur, 309 F.3d at 1227 n.9.* [149]

> In light of *Hicks*, then, *Montana Dept. of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999)*, cannot compel the conclusion that the Navajo Nation lacks the subject-matter jurisdiction to enforce the NPEA and other laws against non-Indian employers who, like the Health District, have

satisfied *Montana* by entering into consensual relationships with employee tribal members on the Reservation.

[**270] An administrator's decision to discipline a skilled Physician's Assistant of long tenure for an erroneous entry on his first-ever time card in an agency where time-card errors seemingly ran rampant, or to retain a clinic office clerk as a "temporary" employee in perpetuity may be characterized in a number of ways, but cannot fairly be termed the "performance of . . . law enforcement duties." *533 U.S. at 373. Hicks* expressly left questions as to tribal control of such unrelated conduct to "the outcome of *Montana* analysis." *Id.* [150]

[**271] *Strate, Atkinson* and *Hicks* leave essentially no room for doubt that *Montana*--with its "two prime exceptions" still intact--governs the issues now before this court on remand.

[*998] *Strate, Atkinson* and *Hicks* leave essentially no room for doubt that *Montana*--with its "two prime exceptions" still intact--governs the issues now before this court on remand.

3. The Navajo Court's Findings of Jurisdictional Facts

In *Manygoats I*, the Navajo Supreme Court aptly observed that "jurisdiction is highly factual. Jurisdictional decisions in contemporary Indian affairs law are largely based upon facts going to the relationship of non-Indians with Indian nations and their members, and where certain activities took place." *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000), at P [23], *available at* http://www.tribal-

institute.org/opinions/2000.NANN.0000003.htm. [151] According to our own court of appeals, "when reviewing tribal court decisions on jurisdictional [*999] issues, district courts should review tribal courts' findings of fact for clear error and conclusions of law de novo." *Mustang Production Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996), cert. denied sub nom. Mustang Fuel Corp. v. Hatch, 520 U.S. 1139, 117 S. Ct. 1288, 137 L. Ed. 2d 364 (1997)*; [152] *accord Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997)*, [**272] *cert. denied, 522 U.S. 1090, 118 S. Ct. 880, 139 L. Ed. 2d 868 (1998)*; *Atkinson Trading Co. v. Shirley, 210 F.3d 1247 (10th Cir. 2000), reversed on other grounds, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).* [153] This court thus gives considerable deference to the Navajo court's findings of fact concerning its own jurisdiction, and has not conducted a *de novo* reconsideration of the evidence presented in that forum.

The Navajo Nation District Court in *Singer, et al. v. San Juan County*, Case No. SR-CV-162-99-CV, made at least a few findings as to facts supporting the exercise of the Navajo court's jurisdiction. The December 28, 1999 Order began with territorial contacts and tribal relationships, specifically, that "the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation," that "two of the three plaintiffs are members of the Navajo Tribe of Indians, the third is married to an enrolled member; and they ALL have significant contact with the [**275] Navajo Nation, as [*1000] does the clinic itself as a major health care provider to the Navajo and other local Native Americans . . . ." (*Id.* at [1].) [154] Opining that plaintiffs' claims "raised issues clearly extending well beyond the mere loss of income

or loss of a job," and went "directly into the wellbeing of the plaintiffs and Navajo Nation citizens" and "as argued by the plaintiffs, go to the soul of a person and their inalienable rights" which "exceeds monetary value," (*id.* at [2]), the Navajo court identified "financial harm suffered by the plaintiffs which has injured their families" as well as "harm to their reputations" as a consequence of the defendants' conduct. (March 1, 2000 Order at 9.)

[**276] Besides causing irreparable injury to important personal interests of the individual plaintiffs, the Navajo court found that the Health District's conduct implicated important considerations of Navajo public policy concerning the welfare of Navajos in the workplace, and threatened to have a "chilling effect" on Navajos who assert employment rights protected by Navajo law. (*Id.* at [14], [15].)

The December 28, 1999 Order explained that the plaintiffs had "also raise[d] claims that the Native American, and in particular, *Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed* by the San Juan Health Services District['s] conduct, by way of: stopping emergency and routine ambulance and EMT service; stopping laboratory services; and billing of IHS patients," that resulted in "effectively turning away many patients, including diabetic patients" from the Montezuma Creek Clinic "for fear of their inability to pay for their care." (*Id.* at [2] (emphasis added).)) The court noted that the District had contracted with the Indian Health Service to provide health care services for Navajo tribal members, (*id.* at [12]), and found that the Health [**277] District's conduct in managing the clinic--involving factual allegations well beyond the plaintiffs'

pleaded employment grievances--was endangering the health and welfare of Navajo patients, "in violation of IHS contracts and regulations" and likewise implicating key Navajo public policy concerns. (*Id.* at [16] ("the defendants have placed at risk numerous patients").)

Applying the "*Montana* exceptions," the Navajo court concluded that (1) the Health District's conduct in "seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries," and then violating "the Navajo Nation's customs and traditions, Bill of Rights; the Navajo Preference in Employment Act;" among others, "all with impunity," in relation to those consensual relationships, satisfied *Montana*'s first consensual relationships" exception; and (2) "the injury sustained by the plaintiffs so specifically directly effects [sic] the health and welfare of the Navajo Nation chapters and their residents," satisfying the second "*Montana* exception." (*Id.* at [19]-[20]).

The balance of the Navajo court's factual findings focused on the Health District's conduct toward the [**278] plaintiffs as employees and toward Navajo patients seeking medical care at the clinic. Almost all of the Navajo court's findings of fact and conclusions of law that serve as the basis for the [*1001] granting of preliminary injunctive and other equitable relief were framed solely in terms of the Health District.

The Navajo court made no specific findings of jurisdictional fact concerning San Juan County, or by name, any of the individual County or Health District defendants, with the exception of Reid Wood. Instead, as recounted above, the March 1, 2000 Order reduced the matter to a single conclusion:

> The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with *Dodge v. Nakai, 298 F. Supp. 17* (Ariz. dist. 1968) and *Clark v. Barnard, 108 U.S. [436, 2 S. Ct. 878, 27 L. Ed. 780] (1883)*. This court has jurisdiction.

(March 1, 2000 Order at 10.)

Perhaps court and counsel assumed that all could be tarred using the same brush.

Yet Due Process--Navajo and Federal--requires much more.

[**279] (*i*) **Fred Riggs**

Mr. Riggs is a Navajo living and working on the Navajo Reservation. He enjoys all of the protections afforded by Navajo law, including the guaranties of Navajo Preference in Employment Act, and there can be no genuine doubt that he may invoke the jurisdiction of the Navajo courts to resolve disputes and remedy injuries affecting him that arise or occur within Navajo country.

(*ii*) **Allison Dickson**

Like Riggs, Mr. Dickson is a Navajo living and working on the Navajo Reservation, well within the civil authority and protection of the Navajo Nation and the jurisdiction of the Navajo courts.

(*iii*) Donna Singer

In contrast to Riggs and Dickson, Ms. Singer is not a Navajo, and at all times pertinent to the Navajo court proceeding, it remains uncontroverted that she resided outside of the Navajo Reservation. Singer is married to a Navajo, and worked as the manager of the Montezuma Creek Clinic, located within the boundaries of the Navajo Reservation, until her employment was terminated by the Health District in December of 1998. She has since returned to work at the clinic under new management.

Of the three plaintiffs, her jurisdictional status [**280] quickly proves to be the most problematic.

Navajo culture and Navajo law affords a special status to nonmember spouses of Navajo members. According to *Means v. District Court*,

> While there is a formal process to obtain membership as a Navajo, see 1 N.N.C. §§ 751-759 (1995), that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoome'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. The primary clan relation is traced through the mother, and some of the "foreign nation" clans include the "Flat Foot-Pima clan," the "Ute people clan," the "Zuni clan," the "Mexican clan," and the "Mescalero Apache clan." See, Saad Ahaah Sinil: Dual Language

> Navajo-English Dictionary, 3-4 (1986). The list of clans based upon other peoples is not exhaustive. A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is [*1002] conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members [**281] under Navajo common law....

Means v. District Court of the Chinle Judicial District, No. SC-CV-61-98 (Navajo S. Ct. 05/11/1999), at P [73]. *Means* held that Russell Means, a non-Navajo "in-law"or *hadane* residing with his Navajo wife on the Navajo Reservation had

> by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a hadane, consented to Navajo Nation criminal jurisdiction. This is not done by 'adoption' in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.

Id. at P [74]. *See generally*, Paul Spruhan, *Case Note:* Means v. District Court of the Chinle Judicial District *and the Hadane Doctrine in Navajo Criminal Law*, 1 Tribal L.J. (2000/2001), *at* http://tlj.unm.edu/articles/volume_1/spruhan/index.php.

In this case, the Navajo court referred to "Mrs. Singer in her tribal in-law status," and observed that "the Navajo clan system, *applicable to in-laws through*

their spouses, demonstrates the unique bonding of Navajo's to other Tribal members *or non-tribal members* [**282] *as family*, and the familial duties inherent to care for other members of the Tribal family," ostensibly as a basis for its conclusion that Singer, Riggs and Dickson had standing to raise claims alleging injury to the interests of Navajo patients of the Montezuma Creek Clinic, none of whom had been joined as parties to the lawsuit. (December 28, 1999 Order at [12].)

As outlined above, the NPEA extends the protection of its provisions to non-Navajo spouses of Navajo members, but requires that they reside "within the territorial jurisdiction of the Navajo Nation for a continuous one-year period immediately preceding the application for Navajo preference consideration" and coverage by the NPEA's protections. Navajo Nation Code, tit. 15, § 614(A) (1995). On the present record, it appears that Ms. Singer had not satisfied this requirement by the time of the termination of her employment by the Health District in December of 1998. Thus, the scope of the law's protection under the NPEA, including the "just cause" requirement, did not extend to Ms. Singer's employment as manager of the Montezuma Creek Clinic.

Whether the protection of Navajo common-law tort law encompasses Singer because [**283] of her *hazha 'aad* ("in-law") status, [155] even though she did not reside within the Navajo Nation at times relevant to her claims, remains unclear under the existing reported Navajo case law, *viz.*, *Means v. District Court*. But even assuming that it does, Navajo court jurisdiction over her claims as a non-Indian plaintiff against non-Indian defendants arising from conduct on non-Indian fee

lands within and beyond the boundaries of the Navajo Nation appears to be foreclosed by controlling Supreme Court precedent.

Concerning litigation arising on non-Indian fee land within reservation boundaries where neither the tribe nor its members are involved as parties, *Strate v. A-1 Contractors* held that the "general principle" of *Montana* applies, rather than its exceptions, and a tribal court does not have jurisdiction to adjudicate the dispute between non-Indian parties. In [**284] *Strate*, [*1003] Gisela Fredericks, the non-Indian spouse of a tribal member, filed suit in tribal court against non-Indian defendants arising out of a traffic accident on a state highway right-of-way within the boundaries of the Fort Berthold Reservation in Montana. The Supreme Court held that the state right-of-way was the jurisdictional equivalent of non-Indian fee land, that *Montana* applied, and that because the lawsuit did not directly involve the tribe or its members, or any "consensual relationship" with the tribe or its members, the tribal court lacked jurisdiction over the dispute. *Strate* also concluded that requiring a non-Indian plaintiff to pursue her claim against non-Indian defendants in state court rather than tribal court did not threaten the tribe's political integrity or self-government sufficiently to trigger *Montana*'s second exception.

Strate v. A-1 Contractors stands for the proposition that civil actions between non-Indian litigants arising from events occurring on non-Indian land within reservation boundaries "fall within state or federal regulatory and adjudicatory governance," and that absent express authorization by federal treaty or statute, "tribal [**285] courts may not entertain claims

against nonmembers arising out of" such circumstances. *520 U.S. at 442.* In the *Strate* Court's view, neither of *Montana*'s exceptions applied to a dispute arising from a highway motor vehicle accident that "is 'distinctly non-tribal in nature.'" *Id. at 457* (quoting *Strate, 76 F.3d 930, 940 (8th Cir. 1996)*(en banc)). The dispute itself did not arise from a "consensual relationship" with an Indian tribe or its members, and did not implicate "'the right of reservation Indians to make their own laws and be ruled by them,'" *id. at 457, 459*:

> Gisela Fredericks may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to "the political integrity, the economic security, or the health and welfare of the [Three Affiliated Tribes]."

Id. at 459 (quoting *Montana, 450 U.S. at 566*) [**286] (footnotes omitted).

Based upon the Navajo court's factual findings, and even taking as true the well-pleaded factual allegations of the Amended Complaint and the "Statement of Material Fact" set forth in plaintiffs' summary judgment memorandum, [156] this court concludes that the Navajo Nation District Court did not have subject-matter jurisdiction over the Health District with respect to the employment-related claims pleaded by

plaintiff Donna Singer, a non-Indian and a non-resident of the Navajo Nation. To avail herself of the protections of the Navajo Preference in Employment Act, she must first satisfy its residency requirement affecting non-Indian spouses of tribal members, [157] and the Navajo court made no [*1004] specific factual findings that Ms. Singer had satisfied that requirement as of the time she commenced and prosecuted her action in the Navajo court.

[**287] As to Ms. Singer's common-law tort claims (*e.g.*, defamation, infliction of emotional distress) against the non-Indian County and Health District defendants, controlling Supreme Court precedent indicates that the Navajo court lacked subject-matter jurisdiction of her claims against those defendants. *See Strate, 520 U.S. at 456-459.* Ms. Singer's *hazha 'aad* ("in-law") status under Navajo common law does not alter her status as a "non-Indian" under federal law, and where the question is whether tribal jurisdiction extends to non-Indian litigants in a particular case, federal law governs. Therefore, with the possible exception of her claim against one Health District Board member, Roger Atcitty, who is an enrolled Navajo tribal member living within Navajo Nation boundaries (*see* Amended Complaint at 106), *Strate* denies Ms. Singer the option of pursuing her employment-related claims in the courts of the Navajo Nation because the Navajo courts lack the subject-matter jurisdiction required to adjudicate them. As a nonmember suing nonmember defendants located in Utah, her remedy would lie in the Utah State courts, and if she asserts federal claims, in federal [**288] district court.

(*iv*) San Juan County

Named as a defendant "as governing authority over the San Juan Health District and in its own right," (Navajo Ct. Cmplt. at 2 P 2), San Juan County was not alleged to have directly engaged in any of the conduct resulting in Ms. Singer's termination, Mr. Rigg's diminishment in status and pay, or Mr. Dickson's continuation as something less than a full-time, permanent regular employee of the Health District. Instead, plaintiffs allege that "San Juan County Commissioner's took steps to purposefully avoid taking responsibility for the SJHSD's acts," (*id.* at 35 P 311), even though the County purportedly "can withdraw powers from any District governance board member or employee at any time under *Utah Code 17A-2-1326(6).*" (Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, , 123 S. Ct. 2665, 156 L. Ed. 2d 653, 2003 WL 22428213 (U.S.S.Ct. 2003)*, at ii.) Other allegations appear to be quite innocuous, *e.g.*, Navajo Ct. Cmplt. at 12 P 107 ("San Juan County has given SJHSD money."); *id.* at P 108 ("San Juan County has expanded the number [**289] of board members from five to six and then to seven."). The gist of plaintiffs' claim is that at the time their claims arose, the County exercised complete control over the Health District. (*See generally* Pltfs' Summ. Judg. Mem. (504), at 2-3 PP 2-10.)

[*1005] The Navajo court made very few findings concerning San Juan County itself, even then largely recounting witness testimony: "San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native

Americans that has continued for generations." (December 28, 1999 Order at [15].)

Assertions such as this may provide some background and context for the plaintiffs' claims, and perhaps for the court's findings concerning the Health District's conduct, but by themselves they fail to provide a viable factual predicate for the exercise of Navajo civil jurisdiction over the County in relation to these plaintiffs' claims, [158] even apart from the application of *Montana* and its "two prime exceptions."

[**290] (*v*) **San Juan County Commissioners**

Similar deficiencies weaken the Navajo court's findings of fact concerning the San Juan County Commissioners. Plaintiffs assert that "the facts of the Commissioners sitting on the District's board, financing the District, setting policy for the district, making appointments, being Directed by the County's administrator, advised by the County Attorney, all were fully resolved in Navajo Court." (Pltfs' Summ. Judg. Mem. (504), at 2 Idaho 44, 3 P 10.) Assuming this is so, the Navajo court made very few findings to that effect, and nowhere in the three orders did it find that "in actuality, the County and District were alter egos of each other," as plaintiffs themselves assert. (*Id.*)

The Navajo Court focused on the employment relationships between Singer, Riggs and Dickson and the Health District, and on the District's conduct adversely affecting those relationships to the detriment of these plaintiffs; it also addressed actions by the District that allegedly had adverse effects on Navajo patients of the Montezuma Creek Clinic. But it made virtually no findings concerning the actions of any

County Commissioner, beyond global references [**291] to "the defendants" as a whole.

The Part II Plaintiffs have failed to point to facts bringing the individual San Juan County Commissioners within the subject-matter jurisdiction of the Navajo courts under either of the *Montana* exceptions, or for that matter, under Navajo tort law or the NPEA. *See* Navajo Nation Code tit. 7, § 253(B) (1995).

(*vi*) San Juan County Attorney Craig Halls

Apparently, defendant Craig Halls, the San Juan County Attorney, was named as a defendant because he gave legal advice--or failed to give legal advice--to County and Health District officials on a range of subjects, and "held himself out as SJHSD's legal representative on January 19, 1999," at or about the time of Singer and Riggs' grievance hearings. (*See* Navajo Ct. Cmplt. (Modified) at 12-13 PP 109-122; *id.* at 37 PP 313-316.) Plaintiffs allege that Halls "had a responsibility to ensure that the San Juan Personnel and [*1006] Policies adhered to the NPEA and *Utah Code 17A-2-601* [through] -603," and to "inform the San Juan Service District's trustees of SJHSD's noncompliance with NPEA and the Utah Special District Personnel Management employment laws, [**292] " (*id.* at 12-13 PP 115-116), but "purposely avoided any responsibility for SJHSD's actions after being appraised [sic] of their violations of statutes on January 19, 1999." (*Id.* at 37 P 315.)

The December 28, 1999 Order recites that District administrator Rick Bailey testified "that he relied on Craig Halls' advice to proceed as her grievance hearing officer anyway," even though Bailey "had actually

participated in the decision to terminate Ms Singer." (December 28, 1999 Order at [6].) The Navajo court makes no further findings concerning Halls, other than the global reference to "the defendants." Plaintiffs do not point to any facts in the Navajo court record that would serve as a basis for the exercise of tribal civil jurisdiction over Halls either under Navajo law or the *Montana* exceptions. (*See* Pltfs' Summ. Judg. Mem. (504), at 2-8 PP 1-27.)

(*vii*) County Administrator Richard "Rick" Bailey

Plaintiffs alleged that as San Juan County administrator and "San Juan Health District CEO," Bailey committed "Malfeasance in Office" by failing to inform the Health District Board that defendant Reid Wood had "made material misrepresentations to him, [**293] " and that "by doing little or nothing to rectify the claims of the plaintiffs," Bailey "has endangered the financial well being of SJHSD, and the public safety, health and welfare of the Navajo Nation surrounding Montezuma Creek Clinic." (Navajo Ct. Cmplt. (Modified) at 38-39 PP 321-322, 327.) They further allege that "Mr. Bailey issued grievance decision letters for Mrs. Singer and Mr. Riggs a) without clear charges, b. without clearly identified evidence to justify Mr. Woods' actions, c. without mentioning NPEA; and, d. without referencing the mandates of Utah's Special District Personnel Management Act among other acts." (*Id.* at 20 Colo. 279, 38 P 326.)

In addition to the reference to Bailey's testimony quoted above, the Navajo court found that "Rick Bailey told Ms. Singer that she was viewed as an 'enemy to the hospital' (December 28, 1999 Order at [7]); and in the March 1, 2000 Order, the court recounts that "the

person who initiated the termination process, was also the grievance hearing officer (unbeknown to Singer) and admitted he had a problem with being so[,] thinking that it was improper for him to proceed by his own judgment[,] but did nonetheless," with apparent [**294] reference to Bailey. (March 1, 2000 Order at 7.) But the court makes no other findings as to Bailey, and offers no explanation of the basis for exercising Navajo civil jurisdiction over Bailey individually, in contrast to the Health District itself.

(*viii*) **Summary re: the County Defendants**

As summarized above, the Navajo court orders are essentially devoid of findings of jurisdictional fact as to San Juan County, its named defendant Commissioners, the County Attorney, or Mr. Bailey. Plaintiffs' counsel hotly disputes the County defendants' characterization of the County's role in the Health District's affairs, but the plaintiffs fail to marshal the evidentiary facts that would vindicate the Navajo court's conclusion that it had subject-matter jurisdiction over the County defendants, in contrast to the plaintiffs' former employer, the Health District. (*See* Pltfs' Summ. Judg. Mem. (504), at 2-10 PP 1-27.) Nor does *subject-matter* jurisdiction over the *County* defendants [*1007] arise from the filing of a counterclaim solely against a non-Indian litigant by "the defendants"--a counterclaim that is pleaded solely in terms of injuries to and relief sought by the Health District [**295] alone. (*See* "Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, in *Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District), at 28-42 PP 1-70, *available in* Pertinent Parts Navajo Ct. R. ("Complaint for Damages" Tab).) [159]

[**296] While this court declines to adopt the County defendants' view of the governing law after *Nevada v. Hicks*, it does not require a strained reading of the controlling precedents to conclude that the Navajo court lacked subject-matter jurisdiction over San Juan County, the County Commissioners, the County Attorney, and County administrator Bailey, based upon the limited fact findings made by that court. The Navajo court did not identify any consensual relationship between any County defendant and the Navajo Nation and its members that would satisfy *Montana*'s first exception. Nor did it find facts showing conduct on the part of any County defendant that threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the Navajo Nation. [160]

[**297] Remembering that "the District Courts of the Navajo Nation shall have original jurisdiction over . . . all civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation," *Navajo Nation Code*, tit. 7, § 253(B) (1995), the Navajo court made no findings of fact as to individual residence or any specific conduct on the part of the named individual County defendants that "has caused an action"--or any injury to plaintiffs Riggs or Dickson--"to occur within the territorial jurisdiction of the Navajo Nation."

The same cannot be said for the San Juan Health Services District.

(*ix*) San Juan Health Services District

"Sued as the employer of the plaintiffs and, at all time herein and throughout this legal action, San Juan

County's alter ego," (Navajo Ct. Cmplt. at 2 P 3), the Health District stands out as the primary target of the plaintiffs' claims, the Navajo court's factual findings, and the [*1008] relief granted to plaintiffs in the three orders now at issue.

In its December 28, 1999 Order, the Navajo court found that the Health District was an "employer" covered [**298] by the NPEA; that the District had violated the NPEA's requirements in several respects by the actions it had taken with respect to Singer and Riggs, and otherwise; that the District had denied Dickson full-time permanent status in violation of its own policies; that the District's wrongful conduct was causing irreparable injury to plaintiffs Singer, Riggs and Dickson and to their relationships with their families and community; that other conduct by the District unrelated to plaintiffs' employment threatened serious injury to the interests of Navajo patients seeking health care at the Montezuma Creek Clinic, to whom the District was legally obligated to provide services under its contract with the Indian Health Service; and that plaintiffs had presented sufficient evidence to warrant issuance of preliminary injunctive and other equitable relief. (December 28, 1999 Order, *passim.*)

The Navajo court found both *Montana* exceptions to have been satisfied by the Health District's conduct: (1) the conduct of the District in "seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries," and then violating "the Navajo Nation's customs and traditions, [**299] Bill of Rights; the Navajo Preference in Employment Act;" among others, "all with impunity," comes within *Montana*'s "consensual relationships" exception, and (2) that "the

injury sustained by the plaintiffs so specifically directly effects [sic] the health and welfare of the Navajo Nation chapters and their residents pursuant to the *Montana* exceptions." (*Id.* at [19]-[20].) The Navajo court thus found that the District entered into "consensual relationships with the tribe['s] . . . members, through . . . contracts, . . . or other arrangements," *Montana, 450 U.S. at 565*, by employing the Navajo plaintiffs, Riggs and Dickson, during its reign at the Montezuma Creek Clinic. (*See* December 28, 1999 Order at [20].[161])

[**300] In this setting, "The 'consensual relationship' with Navajos is an employer-employee one, and employment is a contract." *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000), at P [45]. Remembering that *Atkinson* "requires that the . . . regulation imposed by the Indian tribe have a nexus to the consensual relationship itself," *532 U.S. at 656*, "Such a nexus clearly exists here. The regulation at issue is the NPEA, which governs the terms and conditions of *employment* of Navajo workers on the Nation's territory. The relevant consensual relationship is an *employment contract* between Cameron and its Navajo workers; therefore, the nexus requirement is met." *Manygoats v. Atkinson Trading Co., Inc.*, No. SC-CV-62-2000 (Navajo S. Ct. 08/12/2003), at P [41] (emphasis in original).

Indeed, "Regardless of the selection criteria or method used to create it, the employer-employee relationship is a contractual relationship." 1 Mark A. Rothstein, et al., *Employment Law* § 1.27, at [*1009] 112 (2d ed. 1999). Like Navajo law, Utah law recognizes the contractual nature of employment relationships, including employment "at will": "Under Utah [**301] law, an employment relationship entered into for an

indefinite period of time is presumed to be at-will and gives rise to *a contractual arrangement* where the employer or the employee may terminate the employment for any reason, except as provided by law." *Rackley v. Fairview Care Centers, Inc., 2001 UT 32, P 12, 23 P.3d 1022, 1026* (emphasis added) (citing *Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)*; *Fox v. MCI Communs. Corp., 931 P.2d 857, 859 (Utah 1997)*; *Brehany v. Nordstrom, Inc., 812 P.2d 49, 53-55 (Utah 1991)*; *Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989)*; *Bihlmaier v. Carson, 603 P.2d 790, 792 (Utah 1979)).*

> When a contract for employment or personal services does not recite a fixed term, the law in Utah does not call for the judicial reformation of the contract to impose a term, especially where, as here, neither party disputes the contract was of indefinite duration. Indeed, in a case in which we traced the historical development of the law associated with employment contracts, we specifically noted that courts long ago [**302] repudiated a common law rule under which a term was implied when an employment contract did not specify a duration. *Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1040-41 (Utah 1989).* In its place, courts in Utah and elsewhere adopted *the at-will employment rule,* under which employment contracts that did not specify a duration were generally presumed to be terminable at will. *Id. at 1041.* In time, Utah recognized an exception under which an employee could rebut the at-will

> presumption associated with indefinite-length contracts by showing the parties intended the contract be terminable for cause. *Johnson v. Morton Thiokol, Inc., 818 P.2d 997 at 1000-01 & n. 9 (1991)*; see also *Brehany v. Nordstrom, Inc., 812 P.2d 49, 54 (Utah 1991)*. Significantly, nothing in *Johnson, Brehany*, or *Berube* suggests that a court should sua sponte impose a term on an indefinite-length employment contract that provides for termination for cause.

Uintah Basin Medical Center v. Hardy, 2002 UT 92, 54 P.3d 1165, **21, *2002 UT 92, 54 P.3d 1165, 1170* (emphasis added & footnote omitted). [162] *See, e.g., Francisconi v. Union Pacific R. Co., 2001 UT App 350, P 9, 36 P.3d 999, 1002* [**303] ("Because Francisconi's *employment contract* with Union Pacific did 'not have a specified term of duration,' it is presumed to be an at-will arrangement." (emphasis added)). [163]

In Utah, "An at-will employee may overcome the at-will presumption by showing, among other things, that: ""*a statute* [**304] *or regulation restricts the right of an employer to terminate an employee under certain conditions;*"" *Rackley v. Fairview Care Centers, Inc., 2001 UT 32, at P 13, 23 P.3d at 1026* (quoting *Burton v. Exam. Ctr. Indus. & Gen. Med. Clinic, Inc., 2000 UT 18, P 6, 994 P.2d 1261* (quoting *Fox, 931* [*1010] *P.2d at 859*)) (emphasis added). [164] The NPEA may be just such a statute, because its effects are at least two-fold: the NPEA imposes specific regulatory restrictions on employer conduct, enforceable by the ONLR and the Labor Commission; it also writes "the requirements of the Act" into all employment contracts "as affirmative

contractual obligations of the contracting parties." Navajo Nation Code, tit. 15, § 609(A) (1995). Riggs and Dickson's employment contracts would thus include the NPEA's "just cause" and formal notice requirements, among other terms defining their relationships with the District.

[**305] *Montana* reaffirms that the Navajo Nation has inherent civil authority over contractual relationships between non-Indians and tribal members, even as to activities on non-Indian fee land within its boundaries. Employment contracts simply represent one species of "consensual relationship" within *Montana*'s first exception. So the employment of Riggs and Dickson satisfies *Montana's* first exception and establishes the subject-matter jurisdiction of the Navajo Nation and the Navajo courts over Riggs and Dickson's employer, the San Juan Health Services District, as to the District's conduct of those contractual employment relationships--at least as to cognizable civil claims arising from those relationships. [165] *See United States ex rel. Morongo Band of Mission Indians v. Rose, 34 F.3d 901 (9th Cir. 1994).*

[**306] Under the Navajo Supreme Court's reasoning in the *Manygoats* opinions, the District's employment of Navajo members--here, plaintiffs Riggs and Dickson--also implicates the exercise of tribal power "necessary to protect tribal self-government or to control internal relations," *Montana, 450 U.S. at 564.* The protection of tribal members' interests in continuing employment finds its place among those core interests well within the scope of the Navajos' right "to make their own laws and be governed by them," *Hicks, 533 U.S. at 361.* That right must include the tribe's sovereign "police" power to protect the health, safety

and welfare of its constituents. *See Arizona Public Service Co. v. Office of Navajo Labor Relations*, No. A-CV-08-87 (Navajo S. Ct. 10/08/1990), at PP [102], [104] ("The Navajo nation, as a sovereign, at all times retains the power to protect the health, welfare and safety of its citizens, using police power," and the NPEA "is traditional employment and civil rights legislation well within the police power of the Navajo Nation."); *id.* at P [108] ("Among the purposes of NPEA is the protection of the health, safety and welfare [**307] of Navajo workers. 15 N.T.C. [*1011] § 602(a)(6)."). *Montana*'s second exception for conduct that "threatens or has some direct effect on . . . the economic security, or the health or welfare of the tribe" echoes these same police power concerns. [166]

The Navajo Supreme Court has declared that "the overriding authority of the Navajo Nation to protect its workers [**308] is essential to the economic interests of the Navajo Nation. . . . Employment is a vital right, and the power to regulate employment relations is essential to the Navajo Nation's economic interests. " *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo S. Ct. 08/18/2000), at PP [23], [24], *available at* http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm. "The Navajo Nation retains the right and the duty to protect its members, the public at large, and its territory," and the Navajo Nation Council "recognized that the regulation of employment relations and the protection of workers are essential when it adopted the Navajo Preference in Employment Act. See, 15 N.N.C. § 602(A)(6)." *Manygoats v Cameron Trading Post*, No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000), at P [47]. In the Navajo Supreme Court's view, "Those are among

the most important government powers generally," *id.*, a view that would find widespread acceptance well beyond the Navajo Nation's boundaries.

In a tribal community that depends so heavily on the wage economy, regulation of the terms and conditions of Navajo employment and protection of the employment security of tribal members [**309] finds its footing in governmental interests certainly no less significant than the tribe's interest in regulation of consumer credit transactions--and the Supreme Court vindicated *exclusive* Navajo jurisdiction over consumer credit transactions between tribal members and non-Indians in *Williams v. Lee*, decided in 1959. *Williams v. Lee* and more recently, *Iowa Mutual* recognized that "adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual, 480 U.S. at 16.* [167] This is no less true of tribal employment laws today than it was of tribal consumer credit laws in 1959, or now.

[**310] This court is satisfied that the Navajo Nation and the Navajo courts have inherent civil authority and adjudicative jurisdiction over the Health District under *Montana's* second exception as well.

Based upon the inherent authority of the Navajo Nation as an Indian nation, the recognition of its authority in the Navajo Nation's 1868 Treaty with the United States of America, and the 1933 Act enlarging the boundaries of the Navajo Reservation [*1012] to include, *inter alia*, the land on which the Montezuma Creek Clinic now sits, this court concludes that the Navajo Nation District Court had subject-matter jurisdiction of plaintiffs Riggs and Dickson's claims

against the San Juan Health Services District arising from their respective employment relationships at that facility. *See Montana v. United States, 450 U.S. at 565-566*; *Manygoats v. Cameron Trading Post,* No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000), at P [40]; *Manygoats v. Atkinson Trading Co., Inc.,* No. SC-CV-62-2000 (Navajo S. Ct. 08/12/2003) at PP [41], [43]-[44]; Navajo Nation Code, tit. 7, § 253(B)(1995).

(*x*) Health District Board Members

Besides naming the Health District as a defendant, [**311] plaintiffs joined the individual members of the District's governing board, either in their official capacity or in both their official and individual capacities. [168] The Navajo court's orders do not discuss the individual Board members at all, apart from the global reference to "the defendants." Nor do plaintiffs point to any facts in the Navajo court record that would serve as a basis for the exercise of civil jurisdiction under *Navajo Nation Code* § 253(B) over those non-Navajo Board members who were sued in their individual capacity. (*See* Pltfs' Summ. Judg. Mem. (504), at 2-8 PP 1-27; cf. Navajo Ct. Cmplt (Modified) at 13-15 PP 123-125, 128-129, 148; *id.* at 35-37 PP 308-309(a)-(h); *id.* at *20 Colo. 546, 39 P 336.*)

[**312] The relevant provisions of the Navajo Preference in Employment Act may govern the conduct of plaintiffs' *employer,* the Health District, but the NPEA says nothing about extending liability under its remedial provisions to individual directors or trustees governing an "employer" entity. *See* Navajo Nation Code, tit. 15, §§ 603(C) ("employer" defined); *id.* at § 604(8) ("All employers shall not penalize, discipline, discharge or take action against any Navajo employee

without just cause."). Nor have plaintiffs identified any other cognizable claim for which the non-Navajo Board members may be haled into tribal court under § 253(B).

The controlling case authority in this Circuit counsels that district courts should give considerable deference to a tribal court's findings of fact on jurisdictional issues, but such deference becomes purely academic where no findings were made. Plaintiffs offer no assistance in this regard, leaving this court with no basis to conclude otherwise than that the Navajo court lacked subject-matter jurisdiction over the non-Indian Board member defendants.

(*xi*) Roger Atcitty

The court also concludes that the Navajo court had exclusive subject-matter [**313] jurisdiction over plaintiffs' claims against defendant Roger Atcitty based upon his tribal membership and his residence. The Navajo court's subject-matter jurisdiction over Roger Atcitty, an enrolled Navajo tribal member living within Navajo Nation boundaries, (*see* Amended Complaint at 106), raises no *Montana* issue, and would clearly be established by § 253(B) of Title 7 of the *Navajo Nation Code*--had the court made specific factual findings to that effect. Navajo Nation Code, tit. 7, § 253(B) (1995) ("The District Courts of [*1013] the Navajo Nation shall have original jurisdiction over . . . all civil actions *in which the defendant is a resident of Navajo Indian Country*, . . ." (emphasis added)). Absent such findings, it nevertheless appears that the requisite jurisdictional facts concerning Atcitty are uncontroverted. Thus, this court concludes that the Navajo court had *exclusive* subject-matter jurisdiction of the claim(s) of Singer, Riggs and Dickson against him, insofar as the claim(s)

arose within the boundaries of the Navajo Reservation, and insofar as the claim(s) actually exist. *See Fisher v. District Court of the Sixteenth Jud. Dist., 424 U.S. 382, 386-389, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976)*; [**314] *Williams v. Lee, 358 U.S. 217, 220-223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).*

(*xii*) Lauren "Laurie" Schafer

Plaintiffs sued Lauren ("Laurie") Schafer as "SJHSD Personnel Director of Nursing," (Navajo Ct. Cmplt. (Modified) at 3 P 11), apparently on the theory that "Mrs. Schafer acted in concert with Mr. Woods and Mrs. Nielsen to harm the defendants," in three alleged particulars:

> 342. Mrs. Schafer knew Mrs. Singer was not a dishonest person and did nothing to help her.
>
> 343. Mrs. Schafer knew Mr. Wood's charge of fraud for Mr. Riggs and Mrs. Singer was false.
>
> 344. Mrs. Schafer could have helped provide a pre-discharge and pre-discipline hearing for Mrs. Singer and Mr. Riggs, but did not.

(*Id.* at 40 PP 342-2 345; *see id.* at 6 P 39 ("Mrs. Schafer knew Mrs. Singer had many serious and weighty matters to attend to at Montezuma Greek Clinic as part of her employment position and yet did nothing to put the time card mistake into the perspective of a reasonable person, and did nothing to prevent her discharge.").)

The Navajo court orders discuss none of this, referring instead to "[a] letter from Lauren Schafer critical of Ms. Singer" [**315] that had been kept in a file in the District CEO's office, and to Schafer's testimony that "after a 'scrupulous examination' of Singer's record for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer's intent to commit fraud." (December 28, 1999 Order at [10]; *accord* March 1, 2000 Order at 7 (same).)

It remains a mystery what Schafer did that purportedly "caused an action to occur within the territorial jurisdiction of the Navajo Nation," *Navajo Nation Code*, tit. 7, § 253(B), bringing her within the civil jurisdiction of the Navajo court as a defendant sued in her individual capacity--particularly with respect to the claims of plaintiffs Riggs and Dickson. For their part, plaintiffs offer little or no assistance in resolving that question. (*See* Pltfs' Summ. Judg. Mem. (504), *passim*.) [159]

[**316] It appears that the few facts bearing upon Ms. Schafer's relationship to *Singer, et al. v. San Juan County, et al.*, that may be gleaned from the orders and plaintiffs' memoranda had to do with plaintiff *Singer*'s wrongful discharge claims. And if Ms. [*1014] Singer was not properly before the Navajo court, then the plaintiffs' allegations concerning Schafer are entirely irrelevant. Absent factual findings bringing Schafer within the jurisdiction of the Navajo court under *Navajo Nation Code*, tit. 7, § 253(B) there is no need to apply the *Montana* exceptions before concluding that the Navajo court lacked subject-matter jurisdiction over Ms. Schafer.

(*xiii*) Reid Wood

Named as a defendant in his capacity as "interim" and then "permanent" Health District CEO, Reid Wood was a central character in the events recounted above that form the factual basis for plaintiffs Singer, Riggs and Dickson's employment-related claims. (*See supra*, at 12-26.) It was Wood who took adverse action against Singer and Riggs based upon the "time card" errors that occurred in November of 1998, terminating Singer and disciplining Riggs by placing him on "probation." It was Wood who allegedly [**317] made various comments that the plaintiffs found to be demeaning. And it is Wood who was the one individual defendant about whose conduct the Navajo court made findings as to culpability, *viz.*, that he had denied the plaintiffs due process and equal protection in taking adverse action based upon "the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name," ostensibly resulting in actual, even "irreparable injury" to the plaintiffs. (December 28, 1999 Order at [15].) Wood is also the one to whom a remark comparing Navajo Certificates of Indian Blood to "dog tags" was attributed- a comparison the Navajo court found to be reprehensible. (*See* March 1, 2000 Order at 8 ("something this Court would prefer to the evidence on only one time -- in its life time").)

It seems apparent that the Navajo court found that Wood was properly before that court, at least on plaintiffs' civil rights claims and on Singer and Riggs' defamation claims arising from the "time card" controversies. (*See also* March 1, 2000 Order at 9 (defendants failed to "recognize, much less rectify, the harm to [plaintiffs'] reputations").) The legal and factual basis for asserting tribal [**318] civil jurisdiction over Wood's alleged "dog tag" remark is far less apparent.[28]

Based upon the record now before this court, the court is not persuaded that the Navajo court's preliminary finding [**319] concerning Wood's "phony fraud charge," (*viz.*, that his "malicious" characterization of Riggs and Singer's time-card errors as "fraud" may constitute actionable defamation that caused injury to plaintiff Riggs' reputation), is "clearly erroneous." To that extent, at least, this court concludes that the Navajo Nation District Court had subject-matter jurisdiction over defendant Wood for the purpose of plaintiff Riggs' defamation claim.

[*1015] The Navajo court's findings concerning Dickson's employment status claims afford no discernable basis for asserting subject-matter jurisdiction over Wood as an individual defendant for purposes of adjudicating those claims; in essence, Dickson's employment claim amounts to contractual dispute with the District itself. (*See* December 28, 1999 Order at [8]-[9].) [11]

[**320] (*xiv*) Summary

Based largely upon the findings of jurisdictional fact made by the Navajo Nation District Court in its orders in *Singer, et al. v. San Juan County, et al.*, this court concludes that the Navajo court had subject-matter jurisdiction over the San Juan Health Services District for the purposes of adjudicating at least some of plaintiffs Riggs and Dickson's employment-related claims against the District as their employer, consistent with the *Navajo Nation Code* and controlling Supreme Court precedent. This court concludes that the Navajo court likewise had subject-matter jurisdiction of Riggs' defamation claim against the District and Wood, (*see* Navajo Ct. Cmplt. at 23-24 PP 222-223, 228), and of

Singer, Riggs and Dickson's claims against defendant Atcitty.

C. Navajo Court Judgments in the Federal Courts

1. Comity vs. Full Faith and Credit

In their Amended Complaint, by motion--and at one point, by petition for a writ of mandamus--the Part II Plaintiffs have raised the question of what degree of recognition should be afforded to orders of the Navajo courts. As the court of appeals explained, they seek enforcement of the Navajo [**321] court injunction under *Full Faith and Credit Clause of the Constitution* or, in the alternative, comity principles. Under the *Full Faith and Credit Clause*,

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in

> every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. *Compare United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, 15 L.Ed. 299 (1855)* (holding that the Cherokee [**322] Nation was a "territory" for purposes of a federal letters of administration law), *with New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474-75, 29 S.Ct. 190, 53 L.Ed. 286 (1909)* (citing, with approval, *Ex Parte Morgan, 20 F. 298, 305 (W.D.Ark.1883)*, which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). *See generally Wilson v.* [*1016] *Marchington, 127 F.3d 805, 808-09 (9th Cir.1997)* (discussing the issue at length and ultimately holding that neither the *Full Faith and Credit Clause* nor *28 U.S.C. § 1738* is applicable to tribal judgments).

309 F.3d at 1225. The court of appeals did not decide the merits of this issue because the Part II Plaintiffs had not raised it before this court prior to the filing of

their interlocutory appeal. *Id.* Instead, it proceeded upon "the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity." *Id.*

Following remand to this court, plaintiffs Singer, Riggs and Dickson amended their pleadings to say that they "now seek to have the orders enforced under principals [**323] [sic] of full faith and credit, or in the alternative, comity," (Amended Complaint at 115), and urge that of the two approaches, full faith and credit should apply. [172] They subsequently filed a *Rule 56* motion to that same effect, [173] as well as a petition for a writ of mandamus filed first with the court of appeals, [174] and later, with the United States Supreme Court. (*See* Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 2003 WL 22428213 (U.S.S.Ct., 2003)*, at 22 ("WHY FULL FAITH AND CREDIT IN FEDERAL COURTS SHOULD APPLY").) [175] The defendants, in turn, have responded that "to the extent the tribal court's orders can be enforced in federal court, it is only through principles of comity." (San Juan Health District Defendants' Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497), at 28.)

[**325] As the court of appeals indicated, the existing case law on the degree of recognition to be afforded Indian tribal court judgments by the federal courts seemingly "points in opposing directions." Cohen's *Handbook* originally took the position that "the decisions of Indian tribal courts, rendered within their jurisdiction and according to the forms of law or custom recognized by the tribe, are entitled to full faith and credit in the courts of the several states," relying primarily on two Eighth Circuit cases, *Standley v.*

Roberts, 59 F. 836, 845 (8th Cir. 1894), appeal dismissed, 166 U.S. 1177 (1896), and *Raymond v. Raymond, 83 F. 721, 722 (8th Cir. 1897)*. Cohen, *Handbook* (1942 ed.) at 145 & nn. 209-210; *id.* at 275 & nn. 73-74 [*1017] (same). But the 1982 revision of that work explained that the question whether *28 U.S.C.A. § 1738* "includes Indian tribes has resulted in conflicting decisions of state courts," citing *Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P.2d 751 (1975)* (*§ 1738* includes Indian tribes), *In re Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (1976)* (citing [**326] *Jim*), *and Brown v. Babbitt Ford, 117 Ariz. 192, 571 P.2d 689 (Ct. App. 1977)* (*§ 1738* does not include Indian tribes); that "the Supreme Court construed the term territory in an earlier statute to include Indian tribes," and that "other federal decisions have reached the same conclusion," citing *United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, 15 L. Ed. 299 (1856)*, and three Eighth Circuit cases circa 1984, including *Standley v. Roberts*. *Handbook* (1982 ed.) at 385 & nn. 47-49. [156] But the treatise does not take a decisive stance: "Tribal laws in matters within a tribe's jurisdiction are entitled to recognition outside reservation boundaries either as a matter of comity or full faith and credit." *Id.* at 246 (footnotes omitted).

[**327] *Standley* does not reflect what now appears to be the prevailing view:

> The majority of the state and tribal courts that have considered the question have concluded that Indian tribes do not constitute "Territories" or "Possessions" within the meaning of the Full Faith and Credit Act. As for the states, only two-

> Idaho and New Mexico-have held that the term "Territories," as used in the Full Faith and Credit Act, is "broad enough to include Indian tribes." In these states, the judgments of tribal courts must be accorded full faith and credit by state courts, and vice versa. However, most states decline to accord full faith and credit to tribal court judgments, except when required to do so by federal law. Indeed, a "majority of state courts that have considered the question have opted for comity," finding that tribes are not territories for the purposes of full faith and credit.

Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. Rev. 297, 303 (2004) (footnotes omitted). As Judge Canby recently explained:

> [*1018] Some state courts have simply given full faith and credit. E.g., *In re Buehl, 87 Wash.2d 649, 555 P.2d 1334 (1976).* [**328] Others, while denying the applicability of the *full faith and credit clause*, have nevertheless given full effect to tribal judgments or decrees as a matter of "comity." E.g., *In re Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (1962); Matter of Marriage of Red Fox, 23 Or.App. 393, 542 P.2d 918 (1975); Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982).* Federal courts have done the same. See, e.g., *AT & T Corp. v. Coeur D'Alene Tribe, 295 F.3d 899, 903 (9th Cir. 2002).* A few states have

> legislated or adopted court rules on the subject; South Dakota, for example, permits recognition of tribal judgments as a matter of comity if a list of conditions is met, including impartiality of the tribal proceedings. S.D. Cod. Laws 1-1-25; see *Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993)*. Other state statutes or rules vary greatly in the degree to which the condition recognition of tribal court judgments. . . .

William C. Canby, Jr., *American Indian Law in a Nutshell* 227 (4th ed. 2004).

New Mexico and Idaho have addressed the question fairly recently, adopting the view that Indian [**329] tribes are "territories" or "possessions" within the meaning of *28 U.S.C.A. § 1738*. *See Halwood v. Cowboy Auto Sales, Inc., 1997 NMCA 98, 124 N.M. 77, 79-82, 946 P.2d 1088, 1090-1093 (Ct. App. 1997)* (Navajo court "award of punitive damages against a non-Indian for conduct occurring on a Navajo reservation is entitled to full faith and credit in New Mexico courts"), *cert. denied, 123 N.M. 626, 944 P.2d 274 (1997)*; *Jim v. CIT Financial Services Corp., 87 N.M. 362, 363, 533 P.2d 751, 752 (1975)*; [fn] *Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982)* (adopting full faith and credit approach to tribal court orders). Several state courts have expressly declined to extend full faith and credit to tribal orders, judgments and decrees. *See Day v. State, 272 Mont. 170, 900 P.2d 296, 301 (1995)*; *Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 571 P.2d 689, 694 (Ariz. Ct. App. 1977)* (holding that the "word 'territory' as used in *28 U.S.C. § 1738* was not intended to apply to [Indian tribal governments]"); *Desjarlait v. Desjarlait,*

379 N.W.2d at 144 (holding that [**330] *Full Faith and Credit Clause* applies only to states, not tribes); *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, 462 N.W.2d 164 (N.D. 1990)* (same); *Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977)* (same).

[**331] "Numerous states have, by case law, statute, or court rule, expressly adopted comity as their policy for the recognition and enforcement of tribal court decisions. Among these states are Arizona, Connecticut, [*1019] Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming." Gunn, *Compacts, Confederacies, and Comity*, at 303 n.43. [178]

[**332] Congress has enacted legislation mandating the "full faith and credit" recognition of tribal court judgments and orders in very specific contexts. [179] As noted above, the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, Title I, § 101, 92 Stat. 3069, 3071 (1978), *codified at 25 U.S.C.A. § 1911(d)(2001)*, requires the "United States, every State, every territory or possession of the United States, and every Indian tribe" to "give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." The Utah courts have acknowledged this, at the same time that they indicate that full faith and credit recognition does not generally apply to tribal court judgments:

> Although Indian tribes and nations *are not states whose judgments are entitled per se to full faith and credit*, ICWA specifically

> directs that "every State . . . shall give full faith and credit to the . . . judicial proceedings of any Indian tribe applicable to Indian [**333] child custody proceedings to the same extent that such entities give full faith and credit to the . . . judicial proceedings of any other [*1020] entity." *25 U.S.C.A. § 1911(d)(West 2001)*. Accordingly, *as required by statute*, the child custody orders rendered by the Tribal Court *are entitled to full faith and credit*, so long as they comply with the requirements of the [Utah] Foreign Judgment Act.

Searle v. Searle, 2001 UT App 367, P 24, 38 P.3d 307, 314-315 (2001) (emphasis added & footnote omitted).

[**334] In *Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074, 118 S. Ct. 1516, 140 L. Ed. 2d 669 (1998)*, the Ninth Circuit reasoned that these congressional enactments granting "full faith and credit" recognition in specific contexts indicate that Indian tribal court judgments or tribal laws do not routinely command such recognition under *28 U.S.C.A. § 1738*. "Because Indian nations are not referenced in the statute, the question is whether tribes are 'territories or possessions' of the United States under the statute. The United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive . . . ." *127 F.3d at 808*. "In our view," the *Wilson* court explained, "the decisive factor in determining Congress's intent was the enactment of subsequent

statutes which expressly extended full faith and credit to certain tribal proceedings:"

> If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary. Further, the [**335] separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication that Congress did not view these terms as synonymous. Thus, we conclude that Congress did not extend full faith and credit to the tribes under *28 U.S.C. § 1738*.
>
> Further, if Congress had specifically intended to include Indian tribes under the umbrella of *28 U.S.C. § 1738*, it could have easily done so either by specifically referencing them in the 1804 amendments, or by further amending the statute once ambiguous judicial constructions appeared. It chose not to, but rather elected to create a special exception in cases of Indian child custody determinations and land trusts.

127 F.3d at 809. "Given this history," the Ninth Circuit concluded, "it would be imprudent of us to now construe the phrase 'territories and possessions' in the 1804 statute to assume the meaning of the language Congress used in the Indian Child Welfare Act ('every territory or possession of the United States, *and every Indian tribe*') (emphasis added) . . ." *Id. at 809*.

> Certainly, there are policy reasons [**336] which could support an extension of full faith and credit to Indian tribes. Those decisions, however, are within the province of Congress or the states, not this Court. Full faith and credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.

Id. (footnote omitted).

"Like their state court counterparts," and the Ninth Circuit in *Wilson*, "most tribal courts have concluded that the full faith and credit doctrine is not applicable in Indian country." Gunn, *Comparts, Confederacies, and Comity*, at 394.[59]

[*1021] In particular, the Navajo Nation [**337] Court of Appeals articulated the prevailing tribal view when it stated that Indian tribes 'stand beyond the bounds of [the] rule of [full faith and credit], such as it presently exists and governs the constitutional relationships of the states of the United States.'" *Id.* (quoting *In re Guardianship of Chemisa*, 1 Navajo Rptr. 129, 129 (Navajo Ct. App. 1977)). In 1977, the Navajo Court of Appeals wrote:

> It should not be necessary for this court to remind anyone that Indian nations and tribes were not signatories to the United States Constitution and were not intended to be included within the scope of the mandate of Article IV, Section 1. The [full faith and credit] clause, 28 United States Code section 1738

which was written to effectuate the mandate of *Article IV, Section 1*, provide a clear guide to the relationship between Indian courts.

It is our opinion that *28 U.S.C. 1738* does not purport to govern the relationship between Indian courts. The constitutional provision upon which it is based did not envision Indian courts being in existence nor did the act itself. The status of the decisions of Indian courts is generally [**538] determined not in relation to "full faith and credit", but to the concept of the exclusive jurisdiction of each Indian court over certain matters, sanctioned by federal law and United States Supreme Court decisions.

We think, rather, that the issue presented when the decision of any state or Indian court is presented to the courts of the Navajo Nation for enforcement is one of comity. Navajo court will honor and enforce foreign judgments upon consideration of the right of the foreign court to issue the judgment, of the propriety of the proceeding, and of any relevant public policy of the Navajo Nation.

accord Yazza v. Smith, No. SC-CV-21-99 (Navajo 2001), *available at* http://www.tribalinstitute.org/opinions/2001.NANN.0000004.htm (applying principles of comity, not full faith and credit, to enforcement of state court order); *Rough Rock Community School v. Navajo Nation*, No. SC-CV-06-94 (Navajo 1996) (same),[12] *available at* http://www.tribalinstitute.org/opinions/1996.NANN.0000014.htm; *Anderson Petroleum Servs., Inc. v. Chuska Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (Navajo D. Ct. 1983) (same). These cases make it plainly apparent that the Navajo courts have rejected the view now urged by Singer, Riggs and Dickson, *viz.*, that the Navajo Nation is a "territory" of the United States within the meaning and [*1022] scope of § 1738 and subject to "full faith and credit" recognition.[13]

[13] The question of recognition of tribal court judgments in state, federal and other tribal courts has been the subject of considerable academic analysis, criticism and debate.[14] More recently, a 2001 symposium presented by the *University of New Mexico Law Review* (Volume 31, No. 2, Spring 2001) addressed enforcement of tribal court judgments [**341] from several perspectives.[15] Consensus among scholars and judges on the question seems a distant prospect at best. Those advocating full faith and credit recognition emphasize the enforcement of tribal court judgments in state and federal courts. Most of the scholarship advocating adoption of a comity model focuses on the obligation of tribal courts to enforce federal or state judgments. Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 291-93 (4th ed. 2003).

In this case, the *MacArthur* panel assumed (without deciding) that the view reflected in the Navajo precedents and a majority of the other jurisdictions that have considered it is the correct one. For their part, the defendants have aligned themselves with that view, citing *Wilson*.

The "Indian Territory" cases like *Standley* did not construe *§ 1738*, and if extended beyond their specific historical context, they may be read too broadly--illustrating the perils of generalization in a field in which history so often proves decisive. [186] Nevertheless, these [**343] cases remain matters of some consequence in this circuit: because the Eighth Circuit Court of Appeals of the 1890s handled appeals from the District of Utah and nearby districts that [*1023] were later incorporated into the Tenth Circuit, its cases have binding precedential effect in this District, unless and until they are overruled by the Tenth Circuit. *See, e.g., 1st Nat. Credit Corp. v. Von Hake, 511 F.Supp. 634, 641 n.7 (D. Utah 1981).* [187] Neither the Tenth Circuit nor the Eighth Circuit have expressly overruled *Standley* or the other 1890s "Indian Territory" cases on this point.

[**344] This court has explored the question in some detail, first because the plaintiffs have pressed the issue since the remand, [188] but even more so to indicate that resolution of the full faith and credit vs. comity issue in this circuit will require something more than the rote application of *Wilson v. Marchington*'s reading of *§ 1738*.

Though the Part II Plaintiffs have now raised the question of enforcement of the three orders at issue both as a matter of full faith and credit or comity, this

court need not decide *which* of these doctrines govern recognition of Navajo court judgments. Under either approach--and absent specific legislative [**345] mandate to the contrary--this court is *not* required to enforce interlocutory, non-"final" orders of the Navajo courts.

2. Full Faith and Credit, Comity & the Problem of Non-Final Judgments

According to the second *Restatement of Conflict of Laws*, "A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition." *Restatement (Second) of Conflict of Laws § 107* (1971). This general rule "applies to non-final judgments, whether at law or in equity," and "judgments where the amount of recovery is uncertain," *id. § 107 cmt. a*, concerning which the *Restatement* says this: "A judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition." *Id. § 108.*

The rationale for this rule is simple and straightforward:

> A judgment will not be given greater effect abroad than it enjoys at home. A judgment will not have the force of res judicata in the state of rendition as to issues that remain subject to final determination. [**346] The judgment should neither be recognized nor enforced in other states as to such issues. . . .

Id. § 107 cmt. b.

The rule of *§§ 107* and *108* applies between jurisdictions under the *Full Faith and Credit Clause*: "While not explicit in *Article IV, section 1*, only judgments that are both valid and final generally are entitled to full faith and credit." *Matter of* [*1024] *Estate of Jones, 858 P.2d 983, 985 (Utah 1993)* (citing *New York ex rel. Halvey v. Halvey, 330 U.S. 610, 614, 67 S. Ct. 903, 91 L. Ed. 1133 (1947)).*

> To be "valid," for purposes of full faith and credit, a judgment must have been rendered by a court with competent jurisdiction and in compliance with the constitutional requirements of due process.
>
> . . . .
>
> The second requirement for full faith and credit is that the judgment be final according to the laws of the state of rendition. See *Halvey, 330 U.S. at 614, 67 S. Ct. at 906*; *Thorley v. Superior Court, 78 Cal.App.3d 900, 144 Cal.Rptr. 557, 561 (1978)* (citing *Restatement (Second) of Conflicts of Laws, § 107* (1971)); *Andre v. Morrow, 106 Idaho 455 at 462, 680 P.2d 1355 at 1362.* [**347]

Id. at 985, 986.

The *Restatement* view has found general acceptance and recent application, including application to foreign judgments for which recognition was sought under principles of comity. *See, e.g., Rash v. Rash, 173 F.3d 1376, 1380 (11th Cir. 1999); Korea Water Resources*

Corp. v. Lee, 115 Cal. App. 4th 389, 402, 8 Cal. Rptr. 3d 853, 862 (Ct. App. 4th Dist. 2004); *Cahaly v. Benistar Property Exchange Trust Co., Inc., 268 Conn. 264, 275, 842 A.2d 1113, 1120 (2004)*. For example, in *Bianchi v. Savino Del Bene Intern. Freight Forwarders, 329 Ill. App. 3d 908, 925, 264 Ill. Dec. 379, 393, 770 N.E.2d 684, 698 (2002)*, an action brought by a former employee seeking to discover the employer's assets in aid of enforcement of an Italian judgment for wrongful termination was dismissed because the Italian judgment did not determine the actual amount of money owed to the former employee as damages, and was therefore unenforceable in Illinois under the *Restatement* rule.

In federal courts, preliminary injunctions are inescapably interlocutory: "The grant or denial of a preliminary or temporary injunction [**348] does not amount to an adjudication of the ultimate rights in controversy and is not conclusive on the parties or the court in subsequent proceedings." 19 Fed. Proc. L. Ed. *Injunctions and Restraining Orders* § 47:34 (footnote omitted) (citing *Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971)*, among others.) "'The preliminary injunction was by its very nature interlocutory, tentative and impermanent.'" *United States ex rel. Bergen v. Lawrence, 848 F.2d 1502, 1512 (10th Cir. 1988)* (quoting *Madison Square Garden Boxing, Inc. v. Shavers 562 F.2d 141, 144 (2d Cir. 1977))*.

And a finding of a "likelihood of success on the merits" under either *Fed. R. Civ. P. 65* or Navajo *Rule 65* does not equate with the conclusive determination of the merits reflected in a final judgment. Even the statement that the plaintiffs "stand more than an excellent prospect of success in prevailing on the merits

in these proceeding[s] given the presentation and testimony to date" proves to be tentative and inconclusive, particularly where "the plaintiffs need 'only show that they have raised questions going to the merits [**349] so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation'. . . ." (December 28, 1999 Order at [16], [18] (quoting *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986)).*

"As the term is used in the Restatement,. . . a judgment is not a final judgment if further judicial action by the court rendering the judgment is required to resolve the matter litigated." *Restatement (Second) of Conflict of Laws § 107 cmt. a.* The *Restatement* prescribes that "the local [*1025] law of the state of rendition determines whether or not a judgment is final and, if not, what issues remain subject to final determination." *Id. § 107 cmt. c.*

3. Final Judgments Under Navajo Law

Rule 65 of the Navajo Rules of Civil Procedure governs preliminary injunctions, and largely parallels the corresponding Federal *Rule 65.* Neither Rule contemplates the entry of a final order or final judgment under its provisions for "preliminary" relief; that subject is covered elsewhere. *See Fed. R. Civ. P. 54* [**350] , 58; Navajo R. Civ. P. 54, 58(a). [189]

[**351] The *Navajo Nation Code* defines a "judgment":

> In all civil cases, judgment shall consist of an order of the court awarding money

> damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party or a declaration of rights of the moving party.

Navajo Nation Code, tit. 7, § 701(A) (1995). It also directs that "the judge shall render judgment in accordance with the verdict of the jury and existing law." Navajo Nation Code, tit. 7, § 702 (1995). Appeals in the Navajo courts are taken from "final judgments" and "final orders." Navajo Nation Code, tit. 7, § 801 (1995). [190]

[**352] None of the three orders now at issue meet that description. Under Navajo law, "it is the substance, not the title of the document which determines whether a final judgment has been made." *Litzin v. Farmington Motors, Inc.*, No. SC-CV-20-99 (Navajo S. Ct. 05/28/1999), at P 18, *available at* http://www.tribal-institute.org/opinions/1999.NANN.0000005.htm. *Litzin* explains that--however it may be captioned--a document "is a final judgment because the document disposes of the case. '[A] final order results after all the substantial rights of the parties have been litigated and decided on the merits by the district court . . . . The entry of the final decision must preclude further proceedings in the lower tribunal.' [*1026] *Billie v. Abbott*, 5 Nav. R. 201, 203 (1987)." *Id.* at P [22]. [191]

And far from disposing of the case or precluding further proceedings, the first page of the December 28, 1999 Order recited that, having before it "the matter of the application of the plaintiffs for a preliminary

injunction pursuant to *Rule 65(c)* of the Navajo Nation Rules of Civil Procedure, *pending trial in chief* in the matter of the initial complaint drawn by the plaintiffs," the application was "ripe for decision." (December 28, 1999 Order at [1] (emphasis added).) The December 28, 1999 Order, at page [22], and the March 1, 2000 Order, at page 15, expressly contemplated an "initial pretrial conference" to be held "on the limited factual; legal; and damage issues remaining." (*Id.* at [22]; March 1, 2000 Order at 15 (same, to be scheduled in April of 2000).) Clearly, "all the substantial rights of the parties" had not yet "been litigated and decided on the merits by the district court"; nor had further proceedings been precluded by the termination of the litigation. *Billie v. Abbott*, 5 Nav. R. 201, 203, No. A-CV-29-87 (Navajo S. Ct. 07/29/1987), at P [19], *available at* http://www.tribal-institute.org/opinions/1987.NANN.0000019.htm.
[**354] [192]

[**355] These three Navajo court orders "as issued" were not final under the law of the Navajo Nation--"the local law of the state of rendition"--and need "not be recognized or enforced" by this court, either as matter of full faith and credit or as a matter of comity. *Restatement (Second) of Conflict of Laws § 107.*

4. Preliminary Injunctive & other Equitable Relief in the *Singer, et al. v. San Juan County, et al.* Navajo Court Orders

The soundness of the *Restatement* view declining recognition and enforcement of interlocutory orders from another jurisdiction seems apparent when considered in the context of this case. Besides a lack of requisite finality, enforcement of the three Navajo

court orders "as issued" run into additional difficulty because of the nature of the relief granted.

The preliminary *injunctive* relief ordered as against the County and Health [*1027] District defendants by the Navajo court in each of the three orders now at issue was rendered moot by reason of factual circumstances that had changed before this action was even commenced. At this point, it remains uncontroverted that *none* of the defendants retained [**356] any authority over the administration or management of the Montezuma Creek Clinic or over employment decisions at the clinic *after January 1, 2000.* The Navajo Nation had made its own contractual arrangements with Utah Navajo Health Systems to assume responsibility for that facility as of that date, and Utah Navajo Health Systems currently employs all of the Part II Plaintiffs--Singer, Riggs and Dickson--at the Montezuma Creek Clinic.

As the court of appeals recently explained,

> "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).* "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M., 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000),* quoting *County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979).* "The crucial question is whether 'granting a present determination of the

> issues offered . . . will have some effect in the real [**357] world.'" *Citizens for Responsible Gov't State PAC v. Davidson, 236 F.3d 1174 at 1182 (2000)*, quoting *Kennecott Utah Copper Corp. v. Becker, 186 F.3d 1261, 1266 (10th Cir. 1999).*

Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1256 (10th Cir. 2004). In *Utah Animal Rights Coalition*, the court of appeals held that the plaintiff's request for preliminary injunctive relief involving city permits for protests that had been planned for the 2002 Winter Olympics: "The alleged violation took place in 2001, the Olympics have come and gone, and neither temporary restraining order, preliminary injunction, nor permanent injunction could have any present-day effect." *Id. at 1257.*

A claim is moot when there is no reasonable expectation that the alleged violation of law will recur and interim relief or events have eradicated the effects of the violation in question. *See, e.g., Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1524 (10th Cir. 1992)* (citing *County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979)).* "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding [**358] injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *F.E.R. v. Valdez, 58 F.3d 1530, 1534 (10th Cir. 1995)* (quoting *O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)).* There must be an actual, ongoing dispute. If the movant is no longer in harm's way, injunctive relief becomes moot. *See McAlpine v. Thompson, 187 F.3d 1213, 1218 (10th Cir. 1999)* (release

on parole moots an inmate's request for injunctive relief regarding prison conditions and regulations); *Bauchman for Bauchman v. West High School, 132 F.3d 542, 548 (10th Cir. 1997)* (graduation from high school moots student's request for injunctive relief concerning content of high school course curriculum); *cf. Honig v. Students of Cal. Sch. for the Blind, 471 U.S. 148, 105 S. Ct. 1820, 85 L. Ed. 2d 114 (1985)* (appeal from preliminary injunction order vacated when propriety of that relief was rendered moot by subsequent events). [193]

[**359] [*1028] A preliminary injunction represents an award of extraordinary relief, and its enforcement is not justified if there is no likelihood that the complained of behavior will continue. *See, e.g., Securities and Exchange Comm'n v. Pearson, 426 F.2d 1339, 1343 (10th Cir. 1970).* The court of appeals has explained that

> an exception to the mootness doctrine arises in cases which are "capable of repetition, yet evading review." *Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 377, 99 S. Ct. 2898, 2904, 61 L. Ed. 2d 608 (1979)* (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515, 31 S. Ct. 279, 283, 55 L.Ed. 310(1911)).* . . . To meet this exception, two conditions must be satisfied: "(1) the challenged action . . . [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there . . . [must be] a reasonable expectation that the same

> complaining party . . . [will] be subjected to the action again." *Id.*

Fischbach v. New Mexico Activities Ass'n, 38 F.3d 1159, 1161 (10th Cir. 1994). [194] But as was the case in *Fishbach,* "neither [**360] requirement of this exception is met in this case." *Id.*

Singer, Riggs and Dickson are no longer employed by the Health District; they continue to work at the Montezuma Creek Clinic, but at the behest of another employer. They no longer have any direct concern with whether the District complies with the NPEA or other requirements of Navajo law, or whether it adopts a merit system for its employees, or engages in nepotism. The portions of the Navajo court orders affecting plaintiffs' future status as Health District employees cannot "have any [**361] present-day effect" in "the real world," *Utah Animal Rights Coalition, 371 F.3d at 1256, 1257;* neither can the portions of the order addressing the Health District's administration of health care services and its advertising of employment opportunities at the clinic. Even as to the billing of IHS-eligible Navajo patients, counsel have long since advised this court that those billing practices have ceased. As to those matters, "This controversy is over, and it will not recur." *Utah Animal Rights Coalition, 371 F.3d at 1257.* [195]

[**362] [*1029] Of the preliminary injunctive relief granted in the December 28, 1999 Order, only the requirement that the Health District "delete and expunge all the charges and writings pertaining to the December 2nd through December 8th charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file" addressed a matter that still

remained within the Health District's purview after it relinquished control over the Montezuma Creek Clinic in January of 2000, and that was not resolved by subsequent events. It may well be that as to expungement of plaintiffs' Health District files, "the passage of time has rendered the injunction superfluous," *Rio Grande Silvery Minnow v. Keys, 355 F.3d 1215, 1219 (10th Cir. 2004)*, but in this regard, the record now before this court is unclear.

The other equitable relief ordered by the Navajo court in favor of Singer, Riggs and Dickson, *viz.*, the award of back pay, back benefits, and similar monetary relief, was and is wholly unliquidated as to amounts. That relief remains interlocutory and provisional in nature, notwithstanding the brief time frame mandated by that court in its March 1st and March 6th Orders within [**363] which the defendants were required to comply.

Absent real numbers, all this court could do is "declare" that the Navajo court made a preliminary finding of liability for back pay, etc., pending a trial on the merits-- which would add nothing to the Navajo orders themselves and would afford no relief of any substance in favor of the Part II Plaintiffs in this forum.

Whatever the merit of the Navajo court's preliminary findings of liability may be, this court cannot sit as a Navajo district court to complete that tribunal's work in making final determinations as to amount. Nor may this court exercise its own judicial power to compel the Health District defendants to pay to these plaintiffs an unknown and undetermined amount of money, particularly in advance of the trial on the merits that was still pending before the tribal forum

at the time these three orders were entered. *See 25 U.S.C.A. § 1302(8)(2001)*

Ironically, the Part II Plaintiffs commenced this action seeking enforcement of the Navajo court orders, but at this point they have placed little or nothing before this court that it may now enforce.

D. Attorney's Fees Awards Under Navajo Law

[**364] In the Navajo courts, "The general rule for awarding attorney's fees is set forth in *Yazzie v. Herrick*, 5 Nav. R. 129, 131 (1987)[:]"

> The attorney's fees rule within the Navajo Nation is that each party in litigation is responsible for their own attorney's fees . . . . Recognized exceptions are (1) when a statute provides for attorney's fees . . . ; (2) when a case presents a special set of circumstances . . .; and (3) if a pleading or document is not submitted in good faith, or it contains material misstatements of fact or law, or is not made upon adequate investigation or research.
>
> Thus, a party must prove that his case is an exception to the rule before he is entitled to attorney's fees.

Largo v. Gregory & Cook, Inc., No. A-CV-11-93 (Navajo 02/17/1995), at PP [68]-[70], *available at* http://www.tribal-institute.org/opinions/1995.NANN.0000001.htm.

[*1030] In granting "attorney's fees, costs and expenses associated with this proceeding" to Singer, Riggs and Dickson in its December 28, 1999 Order, the

Navajo court did not cite or discuss *Yazzie v. Herrick*, or any other precedent; nor did it identify which of the "recognized exceptions" to the Navajo [**365] Nation's general rule it was relying on in making its award. The court simply remarked that "one way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and expenses necessary for the plaintiffs to defend their rights as the Court will order herein." (December 28, 1999 Order at [16].)

As for a statutory basis for a fee award, the Navajo Preference in Employment Act provides for an award of attorney's fees to a prevailing claimant. Section 612(A) of the NPEA states, "if, following notice and hearing the Commission finds that respondent has violated the Act, the Commission shall: . . . (2) In the case of an individual suit initiated pursuant to § 610(H), award costs and attorney's fees if the respondent's position was not substantially justified." Navajo Nation Code, tit. 15, § 612(A)(2) (1995). Like the rest of the NPEA's enforcement provisions, the question of attorney's fees is first committed to the discretion of the Navajo Nation Labor Commission, not to the district courts. [196] The December 28, 1999 Order gives no indication that it is enforcing a Labor Commission award, or indeed, that the Labor Commission had made any [**366] finding of an NPEA violation before that order was entered.

Apart from the NPEA, the Navajo common law rule regarding attorney's fees appears wholly consistent with the general rule of most American jurisdictions that "damages in a tort action do not ordinarily include compensation for attorney's fees or other expenses of the litigation." *Restatement (Second) of Torts § 914(1)*

[**367] (1979). The Navajo court's passing reference to partial compensation for "irreparable injuries" sheds little light on the basis in Navajo law for the preliminary relief awarding attorney's fees, costs and expenses in the December 28, 1999 and March 1, 1990 Orders.

E. Plaintiffs' Standing re: Navajo Patients

Much of the preliminary injunctive relief granted in the Navajo court's December 28, 1999 and March 1, 2000 Orders involved alleged injury to the interests of Navajo patients seeking medical care at the Montezuma Creek Clinic--none of whom were before that court as plaintiffs. The December 28, 1999 Order touched upon the question of the standing of Singer, Riggs and Dickson seek relief on behalf of those patients:

> As in the case of Halona v. Navajo Nation, 1 Nav. R. 189, the key to this case lies "not in non-Indian analysis" as to any matter of standing. Id. at 199. The fact that makes this case most distinguishable . . . is that the plaintiffs have a privilege and a duty under Navajo [*1031] custom and tradition for Mrs. Singer in her in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizens". In Halona, [**368] this tribal status raises issues "peculiar to Navajo tradition and law." The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo's to other tribal members or non-tribal members as family, and the familial

> duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs or traditions.

(December 28, 1999 Order at [12].) The Navajo court thus expressed an expansive view of the plaintiffs' standing to assert the interests of the clinic's Navajo patients, based upon Navajo clan, familial and community obligations.

Plaintiffs cite to *Judy v. White*, No. SC-CV-35-02 (Navajo S. Ct. 08/02/2004), concerning "how standing differs in the Navajo Nation when public concerns are involved." [197] *Judy* involved a lawsuit challenging two Navajo Nation Council resolutions increasing council delegate and presidential compensation for lack of compliance with the Title II Amendments, [**369] and seeking to enjoin the Navajo Nation's chief financial officer from complying with those resolutions. Asserting its power of judicial review, [198] the Navajo Supreme Court discussed the issue of plaintiffs' standing:

> The doctrine of standing has its origins in federal law. For more than 200 years, federal courts have interpreted whether cases are properly before them through the development of doctrines of justiciability including standing, ripeness, and mootness.

> These doctrines are derived from, and intertwined with, the "case and controversy" language within the Constitution. In its theoretical form, justiciability considers whether the dispute sought to be adjudicated can be presented in an adversarial context, in a form historically viewed as capable of judicial resolution by English/American courts. See *Halona v. MacDonald*, 1 Nav. R. 189 (Nav. Ct. App. 1978); *Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)*. The history of the U.S. Constitution and federal courts' justiciability considerations is vast and remarkable, and in its review we are once again sharply reminded that it is not our Dine history, nor that of our own tripartite government.

Id. at [**370] P [24] (footnote omitted). Acknowledging that "our judicial system mimics the American adversarial system in some ways," the court stated that "we will not interpret unintended limitations on the district courts based on federal court case law or inapplicable U.S. legislation."

> That is not to say that we do not recognize the doctrine of standing, but that we do so pursuant to our own common values of substantial justice rather than as the term is understood in federal courts. Navajo courts will take their own path in judicial review, as required by the "Navajo higher law in fundamental customs and traditions, as well as substantive rights found in the Treaty of

[*1032] 1868, the Navajo Nation Bill of Rights, the Judicial Reform Act of 1985, and the Title Two Amendments of 1989." *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319, 324 (Nav. Sup. Ct. 1990).

Standing may become an issue in any matter before the courts, and *we limit our discussion today to standing as it relates to public-law matters and the judicial review of government action.* We have considered standing on numerous occasions without articulating a specific test for the district courts to follow. [**371] We undertake no such effort today, because we believe that absent specific legislative limitations, *anyone may bring a public-law dispute to the Navajo Nation courts.* For our courts to close their doors to legislative review based on standing, either as a matter of convenience or to avoid considering sensitive political issues, is an abrogation of our judicial responsibilities and abhorrent to Dine concepts of participatory governance and due process. "One of the major differences between Western principles of adjudication and Navajo legal procedure as participatory democracy is that it is essentially egalitarian.

Egalitarianism is the fundamental principle of participatory democracy. The egalitarian principle is the ability of the people as a whole to make law." *Downey v. Bigman*, 7 Nav. R. 176, 177 (Nav. Sup. Ct.

1995). It is not for us to choose who may request judicial review. We have never held otherwise.*Id.* at PP [26]-[27] (emphasis added). *Judy v. White* thus expands upon *Halona v. McDonald* [199] and stands for the proposition that *anyone* has standing to challenge the validity of any legislative action of the Navajo Nation Council in [**372] the Navajo courts. [200]

[**373] Even so, the Navajo Supreme Court has taken a less expansive view of the standing of litigants to assert the interests of third parties not before the court. *Manygoats*, for example, denied Atkinson Trading Company standing to assert equal protection claims on behalf of its non-Navajo employees:

> We summarily dismiss the Trading Post's contention that it is denied equal protection of the law because only Navajos can bring claims under the NPEA. We cannot address that claim in this case, because the Trading Post has no standing to assert the rights of its non-Navajo employees. There is no case or controversy on that issue, and there would be one only if a non-Navajo employee attempted to make a claim under the NPEA and it was rejected.

Manygoats I at PP [51]; *accord Manygoats II* at P [46]. Years earlier, the Navajo Court of Appeals reached a similar conclusion as to claims of third party creditors who were not parties to *Hall v. Arthur*, 3 Nav. R. 35 (Navajo Ct. App. 12/16/1980):

> [*1033] To provide guidance for the future we hold that in cases such as this, in

> which there are obligations to third parties, it is not appropriate for the Courts of the Navajo [**374] Nation to award damages based upon the amount owed to persons, or corporations, or governments which are not a party to the litigation. All that a District Court could properly do under such circumstances would be to determine the relative rights of the parties before it.
>
> Not only is it inappropriate for a District Court to determine the amount owed to a person not a party to the litigation, it is also not appropriate for a court to determine which of two parties is liable to such person not a party to the court. . . .

Id. at PP [52]-[53].

This court need not decide whether these plaintiffs had standing in the Navajo court to assert the interests of the non-party Navajo patients under Navajo law, because the preliminary relief granted for their benefit by the Navajo court has by now been rendered moot. Nevertheless, the court has raised the question, in part to emphasize the importance of reading cases like *Judy v. White* and *Halona v. McDonald* in their essential context, but also to emphasize that in the context of a federal district court, invoking *this* court's power to recognize and enforce judgments of a Navajo court raises questions of standing [**375] *in this forum*, particularly where litigants call upon this court to use its power to enforce injunctive relief for the benefit of persons not before the court. In federal court a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

rights or interests of third parties." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).* When a party invokes the jurisdiction of this court, he or she does so subject to the constitutional and prudential constraints that govern this court's exercise of its own judicial power.

F. Governmental Immunity & The Health District Defendants

Early in these proceedings, Judge Kimball of this court entered a Memorandum Decision and Order, filed October 30, 2000 (dkt. no. 81) ("October 30, 2000 Decision"), dismissing the claims of Singer, Riggs and Dickson against the County and Health District defendants on sovereign immunity grounds. *See MacArthur, et al. v. San Juan County, et al., Civil No. 2:00-CV-584DAK, 2000 U.S. Dist. LEXIS 16859* (D. Utah, decided October 30, 2000).

Having decided [**376] that the Navajo court has subject-matter jurisdiction over Riggs and Dickson's claims against the San Juan Health Services District and defendant Wood, this court must now determine whether the adjudication of those claims in the Navajo court was barred by sovereign immunity, as Judge Kimball previously ruled. His initial Memorandum Decision held that the District, as a political subdivision of the State of Utah, was immune from suit in the Navajo court because the State had not waived the common-law immunity of its subdivisions from suit in tribal courts, and that the individual Health District defendants were likewise immune from suit in tribal court under Utah law. [20]

1. The October 30, 2000 Decision & Law of the Case

The Health District defendants now submit that the court's prior Decision [**377] [*1034] was the correct one, and that the "law of the case" doctrine precludes relitigation of that issue following remand, relying on *Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)*, and *Montana v. United States, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*, [202] as authority. (Dist. Summ. Judg. Mem. at 14.)

As the Court explained in *Arizona v. California*, "Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *460 U.S. at 618* [**378] (citing 1B J. Moore & T. Currier, *Moore's Federal Practice* P 0.404 (1982)) (footnote omitted). But as the Court pointed out, "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Id.* (citing *Southern R. Co. v. Clift, 260 U.S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283 (1922)* and *Messenger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912))*. [203]

The Tenth Circuit recently expressed essentially the same understanding:

> The law of the case doctrine sets forth the fairly straightforward legal [**379] and pragmatic principle of certainty throughout the proceedings of a case: "When a court decides upon a rule of law, that decision should continue to govern the same issues in

> subsequent stages in the same case." *Arizona v. California, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983).* However, courts are quick to recognize the flexibility of the rule and are permitted to overturn erroneous rulings as the underlying policy of the rule is one of efficiency, *Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)* (citations omitted), not restraint of judicial power, *Messenger v. Anderson, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912).* Indeed, the presence of new evidence or subsequent contradictory precedent or a determination that the previous ruling was clearly erroneous are legitimate bases for not applying the law of the case doctrine. *Major, 647 F.2d at 112.*

Prairie Band of Potawatomi Nation v. Wagnon, 402 F.3d 1015, 1018 (10th Cir. 2005).

Until it becomes embodied in a final judgment, a legal ruling remains interlocutory and subject to revision by the court that made it. *See, e.g., United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982)* [**380] ("A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment . . . ."); *Collins v. State, 60 F.3d 837 (Table), 1995 WL 405112, at *1 (10th Cir. 1995)*(unpublished disposition) ("All orders prior to the district court's final order . . . were interlocutory; that is, subject to change while the case was ongoing."). *Fed. R. Civ. P. 54(b)* spells this out as to rulings that may be dispositive of claims:

> [*1035] any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and *the order or other form of decision is subject to revision at any time before the entry of judgment* adjudicating all the claims and the rights and liabilities of all the parties. [Emphasis added.]

The *MacArthur* panel vacated the prior order of this court dismissing the claims of plaintiffs Singer, Riggs and Dickson and the matter was remanded for further proceedings. *309 F.3d at 1228.* The court's *Rule 54(b)* [**381] certification of that dismissal order [204] no longer has any force or effect, and the October 30, 2000 Decision continues to be interlocutory. At most, then, as to prior rulings of this court, "law of the case" serves as a guide for the exercise of the court's discretion in departing from the prior rulings.

> At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progession toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time, but efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling. In the end, however, the doctrine of the law of the case does not

> require or encourage a trial court to render a judgment erroneous in law.

1B James Wm. Moore, et al., *Moore's Federal Practice* P 0.404[1] at II-3 (2d ed. rev. 1996) (footnotes omitted).

[**382] **2. State Sovereign Immunity & Tribal Courts**

As to the merits of their sovereign immunity defense, the Health District defendants submit that "Utah and its political subdivisions are immune from suit in the Tribal Court. 'Sovereign immunity is a common law doctrine which precludes litigation against an unconsenting government.'" (Dist. Summ. Judg. Mem. at 15 (quoting *Montana v. Gilham, 932 F. Supp. 1215, 1219 (D. Mont. 1996), aff'd, 133 F.3d 1133 (9th Cir. 1997)).*) "As independent sovereigns, states enjoyed this immunity before the Constitution was ratified, and they retain it today 'except as altered by the plan of the Convention or certain constitutional Amendments.'" (*Id.* (quoting *Alden v. Maine, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).*) In the context of the Constitutional Convention, the Supreme Court has "found a surrender of immunity against particular litigants in only two contexts: suits by sister States, *South Dakota v. North Carolina, 192 U.S. 286, 318, 24 S. Ct. 269, 48 L. Ed. 448 (1904)*, and suits by the United States, *United States v. Texas, 143 U.S. 621, 12 S. Ct. 488, 36 L. Ed. 285 (1892)*." *Blatchford v. Native Village of Noatak, 501 U.S. 775, 781, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991).* [**383] "We have not found a surrender by the United States to suit by the States, *Kansas v. United States, 204 U.S. 331, 342, 27 S. Ct. 388, 51 L. Ed. 510 (1907)*; . . . nor . . . a surrender

by the States to suit by foreign sovereigns, *Monaco [v. Mississippi, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934)]*," *id. at 782* (citation omitted); nor did the Court find a surrender of immunity by the States to suit by Indian tribes, as was attempted in *Blatchford:*

> Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, [*1036] but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. *What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession.* There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which [**384] they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. (emphasis added & citation omitted). In relation to Indian tribes, then, the original sovereign immunity of the States stands undiminished.

In *Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1997)*, the plaintiff sued the State of Montana in the Blackfeet tribal court for injuries suffered in an auto accident on a state highway within the reservation boundaries, seeking to hold Montana liable for its governmental decisions concerning highway design. Rejecting the State's assertion of sovereign immunity, the tribal court entered judgment against it, and Montana challenged the tribal court judgment in federal court. The Ninth Circuit framed the immunity issue in two parts: "Whether the State of Montana is immune from suit in tribal court involves two questions: (1) whether Montana has sovereign immunity from suit in the tribal courts, and (2) if so, whether Montana waived this immunity . . . ." *133 F.3d at 1135* (footnote omitted).

[**385]

> As Hamilton famously observed: "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption as one of the attributes of sovereignty is now enjoyed by the government of every state in the union." The Federalist No. 81, p. 548-49 (J. Cooke ed.1961). As Chief Justice John Marshall more colloquially put it: '[it] is not rational to suppose that a sovereign power should be dragged before a court." 3 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 555 (2d ed. 1863).

> The States and Indian tribes, as co-existing sovereigns with significant and complex commercial, governmental and property interrelationships, often require a mechanism to determine their respective rights and interests. Finding a forum to resolve disputes is problematic, for each sovereign naturally defends the jurisdictional reach of its own courts and resists being "dragged before" the courts of the other. See, e.g., *Wippert v. Blackfeet Tribe, 260 Mont. 93, 859 P.2d 420 (1993).*

Id. (footnote omitted). After considering [**386] the nature of sources of State and tribal sovereignty, the *Gilham* panel "conclude[d] that the States have retained their historic sovereign immunity from suits by individuals and that nothing in the inherent retained powers of tribes abrogates that immunity." *Id. at 1137* (footnote omitted).

> This result is consistent with immunity decisions in other contexts. For example, the United States, as a superior sovereign, is absolutely immune from unconsented suit in tribal court. *United States v. Yakima Tribal Court, 806 F.2d 853, 858-60 (9th Cir. 1986).* Further, tribes have retained their sovereign immunity even from claims raised in a compulsory counterclaim by a State to an action filed by the tribe. *Oklahoma Tax Com'n v. Citizen Band Potawatomi* [*1037] *Indian Tribe of Okla., 498 U.S. 505, 509-10, 111 S. Ct. 905, 909-10, 112 L. Ed. 2d 1112(1991).*

Id. at 1137 n.1. Finding that Montana had not waived its sovereign immunity from suit in tribal court, *Gilham* dismissed the action on relatively narrow grounds:

> In reaching our conclusions about Montana's immunity from Gilham's tort action in tribal court, we do not intend to paint with [**387] too broad a stroke. The jurisdictional reach of tribal courts is an important and vital matter. Development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged. See, e.g., *Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 at 14-15, 107 S. Ct. 971 at 975-76, 94 L. Ed. 2d 10 (1987)*; *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2453-54, 85 L. Ed. 2d 818 (1985)*.
>
> Immunity from tort actions by individuals is also a crucial constituent of sovereignty, both for the tribes and the States. It is consistent with the recognition of sovereignty that both the tribes and the States are immune from unconsented tort actions by individuals in each other's courts. "A real sovereign, a state, a nation is always sovereign. In none of its activities is it ever subject to a higher human will, individual or collective." *Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 568, 46 S. Ct. 611, 70 L.Ed. 1088 (1926)*. In the absence of congressional action or compact between State and tribe,

> we do best by respecting the sovereignty of both the Blackfeet Nation and Montana.

Id. at 1140 (footnote omitted). [**388] [205]

In the October 30, 2000 Decision, the court agreed with the reasoning of *Gilham* that absent an express waiver of immunity, a State cannot be sued in tribal court. The court also found that the same reasoning applied to the State's political subdivisions, including counties and special services districts. Finding no waiver of that immunity by the State of Utah, the court concluded that political subdivisions of the State of Utah remained immune from suit in tribal court because "Utah law is clear that political subdivisions enjoy the same immunity possessed by the State of Utah. *See* Utah Code Ann. § 63-30-2, -3." (*Id.* at 14.)

Five years later, [**389] that analysis remains sound.

3. The Utah Governmental Immunity Act

> Historically, the ability to sue the State of Utah or one of its political subdivisions rested on a determination of whether the governmental entity was protected by the common law doctrine of sovereign immunity. That changed in 1965, when the Utah Legislature enacted the Utah Governmental Immunity Act (the "Act"), which barred all causes of action against the state and its political subdivisions unless expressly authorized by statute. Specifically, the Act provided that "all

> governmental entities," including school districts, "are immune from suit for any injury which results from the exercise of a governmental function." Utah Code Ann. §§ 63-30-2(3), (7), - 3(1) (1997 & Supp.2000). . . .

Tindley v. Salt Lake City School Dist., 2005 UT 30, P 9, 116 P.3d 295, 298 (Utah 2005). As a special service district created under *Utah Code Ann. § 17A-2-1304*, the Health District is a "governmental entity" [*1038] within the meaning of the Act. *See* Utah Code Ann. § 63-30-2(4) & (7) (Supp. 1999) (repealed 2004) [206] ("'Governmental entity' means the state and its political [**390] subdivisions" and includes "any county, . . . *special improvement* or taxing *district*, or other governmental subdivision or public corporation." (emphasis added)).

Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1163-64 (Utah 1993), "established a three-step analysis for determining whether a governmental entity is entitled to immunity [**391] under the Act[:].

> First, was the activity the entity performed a governmental function and therefore immunized from suit by the general grant of immunity contained in section 63-30-3? [Utah Code Ann. § 63-30-3(1).] Second, if the activity was a governmental function, has some other section of the Act waived that blanket immunity? Third, if the blanket immunity has been waived, does the Act also contain an exception to that waiver which results in

> a retention of immunity against the particular claim asserted in this case?

Ledfors, 849 P.2d at 1164.

The first question in this case, then, is whether the District's operation of the Montezuma Creek Clinic was a "governmental function," [207] which was defined by a 1987 amendment to mean:

> any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or [**392] private persons.

Utah Code Ann. § 63-30-2(4)(a) (repealed 2004). According to *Tindley*,

> The 1987 amendment substantively expanded the scope of immunity established by the Act, providing immunity for activities that were once deemed proprietary and, therefore, had not been covered by immunity under the common law. See *Laney, 2002 UT 79 at P 53, 57 P.3d 1007* ("By defining a governmental function as any act of a governmental entity, whether or not the activity is characterized

> as governmental or proprietary, the 1987 amendment effectively grants immunity protection for some activities that were formerly considered proprietary and were not entitled to immunity.").

Tindley, 2005 UT 30, at P 21, 116 P.3d at 301. Defined this broadly, "governmental function" appears to encompass the operation of hospitals and clinics by Utah special [*1039] services districts. *See Carter v. Milford Valley Memorial Hosp., 2000 UT App 21, P 14, 996 P.2d 1076, 1079 (2000).*

[**393] The second issue under *Ledfors* is whether the Act has provided an exception to that immunity through an express waiver:

> Scattered sections of the Act waive immunity under particular circumstances. Thus, the Act permits claims against governmental entities that involve contract obligations, see Utah Code Ann. § 63-30-5 (1997); property, see id. §§ 63-30-6, -10.5; defective public buildings and improvements, see id. § 63-30-9; and negligent acts and omissions of public employees. See id. § 63-30-10. The Act specifically waives immunity for injuries caused by dangerous or defective highways. See id. § 63-30-8. When immunity is waived, the "liability of the [governmental] entity [is] determined as if the entity were a private person." Id. § 63-30-4(1)(b).

Trujillo v. Utah Dept. of Transp., 1999 UT App 227, P 16, 986 P.2d 752, 757. Of possible consequence here is the express waiver "as to any contractual obligation," Utah Code Ann. § 63-30-5(1) (1997) (repealed 2004), and as to "injury proximately caused by the negligent act or omission of an employee within the scope of employment," Utah Code Ann. § 63-30-10 (Supp. 2003) (repealed 2004).

The [**394] next question is whether the Act contains an exception to that waiver. Section 63-30-10 had several subsections that exclude certain activities from the waiver and thereby retain immunity.

> For certain kinds of claims, however, such waivers of immunity are restricted by a number of exceptions. See Utah Code Ann. § 63-30-10 (1997). Thus, although the Act waives immunity for liability from injuries caused by defective conditions of public buildings and highways, and by the negligence of public employees, immunity is retained "if the injury arose out of, in connection with, or result[ed] from" one of nineteen enumerated circumstances. Id. For example, immunity is retained if an injury resulted from a failure to revoke a permit, see id. § 63-30-10(3), or make an inspection. See id. § 63-30-10(4). Immunity is also retained with respect to injuries caused by natural conditions on public land. See id. § 63-30-10(11). Of particular significance in this appeal, immunity is retained for injuries that arise out of "the exercise or performance or the failure to exercise or

> perform a discretionary function, whether or not the discretion is abused." Id. § 63-30-10(1).

Trujillo, 1999 UT App 227, at P 17, 986 P.2d at 757-758. [**395]

Through such an exception to its general waiver, the Act expressly immunizes the State and its political subdivisions against claims of "abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights," Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004)--covering most if not all of plaintiffs' tort claims pleaded in the Navajo court proceeding. *See Oliver v. Woods, 21 F.Supp.2d 1325, 1332 (D.Utah 1998)* ("claims for intentional infliction of emotional distress are barred by § 63-30-10(2) (barring claims for 'infliction of mental anguish')"), *reversed on other grounds, 209 F.3d 1179 (10th Cir. 2000)*; *Petersen v. Board of Education, 855 P.2d 241, 242 (Utah 1993)* (section maintains immunity for assault, even where liability is alleged to arise from the Board's negligence in hiring and supervising the assailant).

The Act provides that with very limited exceptions, an action brought under its provisions "against a governmental entity or its employee for an injury caused by act [*1040] or omission that occurs during the performance of the employee's duties, within [**396] the scope of employment, or under color of authority *is a plaintiff's exclusive remedy*," Utah Code Ann. § 63-30-4(3)(a) (Supp. 2003) (repealed 2004) (emphasis added), [208] and that "the district courts shall have exclusive original jurisdiction over any action

brought under" the Act. Utah Code Ann. § 63-30-16(1) (Supp. 2003) (repealed 2004). [209]

The Tenth Circuit reads the latter provision as "'a positive expression [**397] of policy against suits against Utah in United States courts,'" and one that could not be waived by the State merely entering an appearance and litigating in a case in federal court. *Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226, 1235 (10th Cir. 1999)* (quoting *Richins v. Industrial Constr., Inc., 502 F.2d 1051, 1055 (10th Cir.1974))*. In the face of that provision, only an "extraordinarily effective waiver" of the State's immunity would be effective to subject the State to the jurisdiction of a forum other than its own. *Id.*

4. Counterclaims & the Waiver of State Immunity

In *Sutton*, the court of appeals found such a waiver of *Eleventh Amendment* immunity in the State's removal of a state court action to federal court, where it proceeded to litigate the merits:

> The *Eleventh Amendment* bar to suit against Utah was effectively waived by the Office of the Attorney General of Utah. That office not only caused the removal of the case from state to federal court; the Attorney General's Office for the State has also litigated the merits of the case following its October 17, 1996, removal. The Attorney General's Office [**398] filed in federal court on October 25, 1996, its motion to dismiss with prejudice under *Fed.R.Civ.P. 12(b)(6)* (failure to state a claim for relief), App. at 76-77, and its supporting memorandum for dismissal, id. at 78-91, and

> its reply memorandum of November 18, 1996, on the lack of merit of the amended complaint, id. at 142-151.

Id. In the Tenth Circuit's view, "an unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum." *Id. at 1234* (citing *Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 393-398, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)* (Kennedy, J., concurring)).

By contrast, in *Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997)*, the court of appeals held that the fact that the State filed a counterclaim in a federal court proceeding in which it had raised its *Eleventh Amendment* immunity did not amount to a waiver:

> "A state may waive its *Eleventh Amendment* immunity and consent to suit in federal court." *Johns v. Stewart, 57 F.3d 1544, 1553 (10th Cir. 1995)*. However, we apply "a stringent test" to determine [**399] if such a waiver has occurred. Id. The waiver must be "unequivocal" which means "'only where stated "by the most express language or by such overwhelming implication from the text [of a state statutory or constitutional provision] as [will] leave no room for any other reasonable [*1041] construction."'" *Id.* (quoting *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40, 105 S. Ct. 3142, 3146, 87 L. Ed. 2d 171 (1985)* (quoting *Edelman v. Jordan, 415 U.S. 651, 673, 94 S. Ct. 1347, 1360-61, 39*

> *L. Ed. 2d 662 (1974))).* We conclude that the State did not waive its *Eleventh Amendment* immunity by filing a counterclaim in the circumstances of this case. See *Santee Sioux Tribe of Nebraska v. Nebraska, 121 F.3d 427, 431 (8th Cir. 1997)* ("The Nebraska assistant attorney general's conduct in answering the complaint and filing a counterclaim does not constitute a waiver of Nebraska's *Eleventh Amendment* immunity."); *American Fed'n of State, County and Mun. Employees v. Corrections Dep't, 783 F.Supp. 1320, 1327 (D.N.M. 1992)* (holding that state did not waive *Eleventh Amendment* immunity by removing case to federal court); see also *National R.R. Passenger Corp. v. Rountree Transp. and Rigging, Inc., 896 F.Supp. 1204, 1206-07 (M.D.Fla.1995)* [**400] (noting that courts which find waiver by filing and prosecuting counterclaims still require state defendants to "announce their waiver of *Eleventh Amendment* immunity unequivocally."). The State has continued to assert *Eleventh Amendment* immunity, which is hardly consistent with the kind of unequivocal waiver necessary to waive that immunity.

131 F.3d at 1385 n.4.

Relying on the analogy of *Mescalero Apache Tribe v. New Mexico,* the Health District defendants argue that "because the Health District continued to assert its immunity while asserting a counterclaim, it did not

waive its sovereign immunity from suit." (Dist. Summ. Judg. Mem. at 21.)

The Navajo court rejected this argument, (*see* March 1, 2000 Order at 10 ("the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings")), and plaintiffs insist that under the analogy of *Sutton*, the District waived its sovereign immunity "when it freely chose to bring Navajo legal violations into Navajo court." (Pltfs' Summ. Judg. Mem. (504), at 16 Ore. 479, 19 P 16.)

5. The Health District's Counterclaim

Of the two Tenth Circuit cases, [**401] *Mescalero Apache Tribe v. New Mexico* appears to correspond more closely to this case. The Health District did not "purposefully seek a [tribal] forum" when "facing suit in its own courts," in contrast to the State of Utah in *Sutton*. Like the State of New Mexico in *Mescalero Apache Tribe*, the District continued to assert its sovereign immunity defense to plaintiffs' claims in tribal court, even after it filed its counterclaim against plaintiff Singer.

Plaintiffs' waiver theory is further complicated by this court's determination that the Navajo court lacked subject-matter jurisdiction over Ms. Singer's claims against the District; Singer was the sole defendant named in the District's counterclaim. [210] If the Navajo court had no subject-matter jurisdiction over Singer's claims against the District because of her status as a non-Indian litigant, it follows that it had no subject-matter jurisdiction over the District's counterclaim against her. Any waiver of sovereign immunity

occasioned by the filing of the counterclaim would be ineffectual because matters pertaining to Singer were not properly before the Navajo court in the first place.

[*1042] **6. Sovereign Immunity & Reciprocity**

The Health District defendants also suggest that "the fact that Indian tribes enjoy immunity from suit in state courts also supports the conclusion that states retain sovereign immunity from suit in tribal court," citing *Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981(1998)*. (Dist. Summ. Judg. Mem. at 17.) "Given that tribes are immune from suit," they continue, "this lack of 'mutuality of concession' supports a finding that states are not subject to suit in tribal court." (*Id.* at 18 (quoting *Blatchford, 501 U.S. at 782*).) This argument echoes the court's earlier observation that "there has been no mutuality of concession with Indian tribes, as there was when the states surrendered some of their immunity to the federal government." (October 30, 2000 Decision at 16.)

[**402] Tribal immunity applies to activities of the tribe whether on or off the reservation, and whether the activity is deemed governmental or commercial. *Kiowa Tribe, 523 U.S. at 756*. The immunity embraces tribal agencies, *see Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000)*, [**403] tribal housing authorities, *see Snowbird Constr. Co., Inc. v. United States, 666 F. Supp. 1437, 1441 (D. Idaho 1987)*, and "subordinate economic organizations," *see Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104, 1108 (1989); White Mountain Apache Indian Tribue v. Shelley, 107 Ariz. 4, 480 P.2d*

654, 656 (1971). At least in the absence of some "mutuality of concession" between State and tribal governments, why would it make sense to hold a political subdivision of the State to be subject to tribal court jurisdiction when corresponding tribal entities remain immune from suit in state or federal court?

Again, Navajo case law proves to be instructive.

In *Billie v. Abbott*, the Navajo Supreme Court outlined the Navajo courts' view of the sovereign immunity of state governments:

> Abbott also claims that under Utah's sovereign immunity statute, UTAH CODE ANN. § 63-30-3 (Supp.1979), Billie is barred from suing a Utah official in Navajo court. This would be true if Billie is strictly a resident of Utah suing in Utah state court and not a resident of the Navajo Reservation. A suit against a state in its own court is governed by the [**404] state's own laws. The question remains whether the Navajo court should recognize Utah's defense of sovereign immunity.
>
> Although Abbott has not argued that any federal law may have limited the power of the Navajo Nation over a state official, we feel obligated to make that inquiry. Our review of the Treaty of 1868 has not disclosed any such limitation on Navajo sovereignty. And we have not found any federal statute with such limitation. The fact is suits against state political sub-divisions in tribal courts are not unknown. See, e.g.,

National Farmers Union Ins. Cos. v Crow Tribe, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985) (question of whether tribal court has jurisdiction over state school); *Hubbard v. Chinle School Dist. Nos. 24/25*, 3 Nav. R. 167 (1982).

Billie v. Abbott, No. A-CV-34-87 (Navajo S. Ct. 11/10/1988), at PP [41]-[42], *available at* http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm. *Billie* read *Nevada v. Hall, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979)*, to hold that "when a state is sued in another sovereign's court, the rule governing state suability in its own court is not controlling because 'such a claim necessarily implicates [*1043] the [**405] power and authority of a second sovereign.' *Id. at 416.* And "if a state's sovereign immunity is to be recognized by the second sovereign, then 'its source must be found in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.' *Id. at 416.*" *Id.* at P [43].

> The Navajo Nation does not grant immunity from suit to any state as a matter of comity. We have also not found any agreement, express or implied, between the Navajo Nation and Utah which would require this Court to recognize Utah's defense of sovereign immunity. We have previously said that the states of the Union are foreign governments in relation to the Navajo Nation. *Hubbard*, 3 Nav. R. at 169. In *Hubbard* we further ruled that the

> Navajo Nation courts have jurisdiction over suits against a state. *Id.* at 170. The reverse, however, a suit against the Navajo Nation in Utah court, would be barred by tribal immunity from suit, not as a matter of comity, but based upon federal pre-emption.

Id. at P [44].

While *Billie* rejected a blanket rule of intergovernmental [**406] immunity in favor of a State, state agencies, subdivisions or officers, *Hubbard v. Chinle School Dist. Nos. 24/25*, 3 Nav. R. 167 (Navajo Ct. App. 1982), had already indicated that Navajo courts may decline to exercise tribal jurisdiction over another governmental entity, by agreement or as a "'voluntary decision . . . to respect the dignity of the [other] as a matter of comity'" in particular cases. In *Hubbard*, the Navajo Court of Appeals affirmed the district court's dismissal of an action against a local school district brought by two Navajo former employees, and did so on the basis of comity between sovereigns. *Hubbard* found that the Navajo court had jurisdiction over the school district as a State instrumentality, [211] but counseled restraint in the exercise of that jurisdiction.

[**407] More recently, in *Office of Navajo Labor Relations ex rel Bailon v. Central Consolidated School District No. 22*, the Navajo Supreme Court again considered the question of jurisdiction over a local school district. As to sovereign immunity, the court stated:

> Current analysis has moved beyond its prior focus on intergovernmental immunity.

> As for the arguments about bilateral relations, deference to other sovereigns, *mutuality, reciprocity, and comity*, the New Mexico Supreme Court ruled that Indian nations and their entities can be sued in the New Mexico court system when doing business outside the Indian nation, but not when an action arises within Indian country. Compare *Padilla v. Pueblo of Acoma, 107 N.M. 174,* [*1044] *754 P. 2d 845 (1988)* (an Acoma Pueblo construction company, owned by the Pueblo, could be sued for off-reservation activities) with *Defeo v. Ski Apache Resort, 120 N.M. 640, 904 P. 2d 1065 (N.M. App. 1995)* (no jurisdiction over an Indian nation where the personal injury took place within Indian country). Principles of reciprocity, comity and bilateral relations would prompt us to rule that we will treat the State of New Mexico and [**408] its instrumentalities the same way it treats Indian nations and their instrumentalities.

No. SC-CV-13-98 (Navajo S. Ct. 06/05/2003), at P [25], *available at* http://www.tribal-institute.org/opinions/2003.NANN.0000007.htm.

The common thread connecting the reasoning of *Billie, Hubbard,* and *Central Consolidated School District No. 22* appears to be an evolving *reciprocity* between the Navajo courts and the State courts. *See also Alden v. Maine, 527 U.S. at 749* ("the immunity of one sovereign in the courts of another has often depended in part on comity or agreement"). In light of *Hubbard, Billie,* and *Central Consolidated School*

District No. 22, it would appear that at least in the absence of a specific agreement with the State of Utah, the Navajo courts would "treat the State of [Utah] and its instrumentalities" as Utah "treats Indian nations and their instrumentalities" within and beyond reservation boundaries. But the Utah courts have not yet addressed the immunity of Indian tribes and instrumentalities with any degree of specificity.

As the *Billie* court pointed out, "a suit against the Navajo Nation in Utah court, would be [**409] barred by tribal immunity from suit, not as a matter of comity, but based upon federal pre-emption." Indeed, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)*, so held: "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *523 U.S. at 760. Kiowa* thus extended "the judge made doctrine of sovereign immunity to pre-empt the authority of the state courts to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity." *Id. at 760* (Stevens, Thomas & Ginsburg, dissenting).

In light of *Kiowa*, the Utah courts would be constrained to recognize the Indian nations' sovereign immunity as a matter of federal law, [212] and of course, this court anticipates that the Utah courts would follow the law. If reciprocity and comity are the guiding principles, the Navajo courts would likewise be constrained to recognize the sovereign immunity of the State of Utah, its agencies and subdivisions as a matter of comity under Navajo law. *Central Consolidated School District No.* [**410] *22*, at P [25].

In this case, the Navajo Nation District Court did not address considerations of comity between sovereigns in assuming jurisdiction over San Juan County and the San Juan Health Services District and granting preliminary injunctive relief; instead, it rejected the defendants' assertions of sovereign immunity on the grounds that State sovereign immunity does not extend to local political subdivisions, and that the defendants had waived any immunity by filing counterclaims and fully participating in the Navajo court proceeding. (*See* December 28, 1999 Order at [19]; March 1, 2000 Order at 10-11.) As [*1045] explained above, neither of these grounds have substantive merit.

Given the United States Supreme Court's recent reaffirmation of the scope of tribal immunity under federal law, and given the Navajo Supreme Court's recent elaboration upon Navajo principles of comity and [**411] reciprocity between governments, it appears reasonable to infer that, given the opportunity, the Utah courts would respect Navajo tribal immunity as to Navajo agencies and subdivisions, and that the Navajo Supreme Court would give deference to the State of Utah's sovereign immunity and its limited statutory waiver of that immunity, allowing claims against its subdivisions to be brought exclusively in the Utah district courts. [213] The Navajo Supreme Court has long been familiar with limited waivers of sovereign immunity, such as the Navajo Sovereign Immunity Act, *Navajo Nation Code*, tit. 1, § § 553, 554 (1995), with its exclusive forum provisions. *See, e.g., Raymond v. Navajo Agricultural Products Industry*, No. SC-CV-26-94 (Navajo S. Ct. 07/20/1995), *available at* http://www.tribal-

institute.org/opinions/1995.NANN.0000013.htm (employee's wrongful discharge claims did not fall within the Navajo Sovereign Immunity Act's four express exceptions to tribal immunity from suit).

[**412] As the Ninth Circuit concluded in *Montana v. Gilham*, "In the absence of congressional action or compact between State and tribe, we do best by respecting the sovereignty of both the [Navajo] Nation and [Utah]," *133 F.3d at 1140*, by acknowledging the limitations that exist, and giving deference to considerations of comity and reciprocity in respecting the immunity of sovereigns.

7. Plaintiffs' Claims & the Utah Governmental Immunity Act

Riggs and Dickson's employment-related claims against the District involve a contractual relationship, and arguably come within Utah's waiver of immunity "as to any contractual obligation." Utah Code Ann. § 63-30-5(1) (1997) (repealed 2004). This seems particularly true of Dickson's claim that his retention as a "temporary" employee violated the District's own written employment policy, rather than Navajo law. But the Utah Governmental Immunity Act's exclusive remedy provision still applies, as does the Act's specification that "the district courts shall have exclusive original jurisdiction over any action brought under" the Act, Utah Code Ann. § 63-30-16(1) (Supp. 2003) (repealed 2004). This "'positive expression of policy [**413] against suits against Utah in United States courts,'" would seem to apply equally against suits in Indian tribal courts--indeed, as against *any* forum save the designated one, the Utah state district courts. *Sutton v. Utah State School for the Deaf and*

Blind, 173 F.3d at 1235 (quoting *Richins, 502 F.2d at 1055*).

(i) Contractual Claims

The State of Utah's waiver of sovereign immunity to allow claims as to "any contractual obligation" may permit employment-related contractual claims against subdivisions such as the Health District, but Riggs and Dickson would need to pursue those claims against the District in the designated state forum. Utah Code Ann. § 63-30-5(1) (1997) (repealed [*1046] 2004). Remembering that the NPEA writes "the requirements of the Act" into all employment contracts "as affirmative contractual obligations of the contracting parties," Navajo Nation Code, tit. 15, § 609(A), Riggs and Dickson's employment contracts included the NPEA's "just cause" requirement, among others, overcoming the "at-will" presumption under Utah law. *See Rackley v. Fairview Care Ctrs., Inc., 2001 UT 32, at P 13, 23 P.3d 1022 at 1026 (2001).* [**414] Federal and state courts likely would apply Navajo law to relationships that are governed by Navajo law under traditional choice of law rules. *See, e.g., United States v. Jarvison, 409 F.3d 1221, 1225 (10th Cir. 2005)* ("Navajo law is the appropriate law under which to evaluate the validity of the marriage" between "two Navajo tribal members who live completely within the boundaries of the Navajo Reservation."). [214] The NPEA expressly provides that "in addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke *such remedies for breach* as may be available under the transaction document or applicable law," *Navajo Nation Code*, tit. 15, § 609(A) (emphasis added), suggesting that Riggs and Dickson could pursue claims against the District in

Utah state court for breach of contract, and avoid the bar of the District's governmental immunity. [215] Concededly, that would submit their dispute "to a forum other than the one [Navajos] have established for themselves," *Fisher v. District Court, 424 U.S. at 387-388*, but Navajo principles of comity and reciprocity between sovereigns would [**415] appear to sanction that result.

[**416] **(*ii*) Intentional Tort Claims**

The Utah Governmental Immunity Act shielded the Health District defendants from liability for most intentional torts. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004). [216]

[**417] [*1047] This is no less true as to defendant Atcitty. Adjudication of the plaintiffs' claims in the Navajo Nation District Court against defendant Atcitty personally, arising from his conduct as a member of the Health District's governing board, is likewise barred by the Utah Governmental Immunity Act, absent a finding that Atcitty acted due to fraud or malice. Utah Code Ann. § 63-30-4(3)(b)(i), (4)(a) (Supp. 2003) (repealed 2004). The term "employee" was defined by the Act to include "a governmental entity's officers, employees, servants, *trustees*, commissioners, *members of a governing body, members of a board*, members of a commission, members of an advisory body," among others. Utah Code Ann. § 63-30-2(2)(a) (Supp. 2003) (repealed 2004) (emphasis added). [217] The Act plainly included all members of the Health District board.

Though the Navajo court had subject-matter [**418] jurisdiction over the territory, and over parties and conduct causing injury within that territory, that court could not proceed to adjudicate the liability of the

Health District or its officials acting within the scope of their employment, absent an effective waiver of their immunity from suit in tribal court.

The single exception to this conclusion involves plaintiff Riggs' defamation claim against defendant Wood. As outlined above, the Utah Governmental Immunity Act in force in 2000 excepted claims of libel and slander, *i.e.*, defamation, from the Act's more general waiver of immunity as to actions involving injuries caused by government employees. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004). The Act insulated individual employees from personal liability for such injuries unless "the employee acted or failed to act due to fraud or malice." Utah Code Ann. § 63-30-4(4)(a) (Supp. 2003) (repealed 2004). The Act also excepted actions or proceedings against "the employee . . . whose act or omission gave rise to the claim" from the Act's exclusive remedy provision if "the employee acted or failed to act through fraud or malice." Utah Code Ann. § 63-30-4(3)(b) (Supp. [**419] 2003) (repealed 2004). Thus, a plaintiff asserting a fraud-based or malice-based claim may bring a civil action directly against an individual employee, independent of the remedies provided by the Act, and in effect, sovereign immunity no longer shields the employee against personal liability as adjudged in a forum of the plaintiff's choosing.

In this case, the Navajo court found that Wood likely had published "the phony fraud charge that still maliciously clouds Mr. Riggs' . . . name," resulting in injury to Riggs' reputation. (December 28, 1999 Order at [15]; *see also* March 1, 2000 Order, at 9.) [218] As explained above, this [*1048] court has given deference to that finding as not "clearly erroneous,"

justifying the exercise of Navajo civil jurisdiction over Wood for purposes of that claim. That court's preliminary finding that Wood's conduct was "malicious" likewise excepts Wood from the immunity otherwise afforded him by the Utah Governmental Immunity Act, and plaintiff Riggs may pursue his defamation claim in the Navajo courts.

[**420] ***(iii)* Civil Rights Claims**

Under controlling Supreme Court precedent, the Navajo Nation District Court lacked subject matter jurisdiction under *42 U.S.C.A. § 1983* of any of these plaintiffs' claims arising from the alleged deprivation of a right guaranteed by the Constitution and laws of the United States. *See Nevada v. Hicks, 533 U.S. at 366-369.*

Riggs and Dickson did not invoke *§ 1983* in their pleadings as the basis for their freedom of speech, due process, and equal protection claims, [219] based upon rights "as protected by the . . . the United States," so the jurisdictional footing for those claims remains unclear. [220]

[**421] If pleaded as direct claims under the federal constitutional provisions they invoke, [221] those claims would not lie against the Health District or its officials in their official capacity, *see FDIC v. Meyer, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994); Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10th Cir. 2005)* ("a *Bivens* claim lies against the federal official in his individual capacity--not, as here, against individuals in their official capacity"), [222] and in this Circuit, would not lie against local officials in their *individual* capacity. [223]

[**423] [*1049] Moreover, the concerns expressed in *Nevada v. Hicks* concerning tribal court jurisdiction over *§ 1983* actions would also seem to apply to causes of action implied directly under the *Fourteenth Amendment*. If "a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction," as augmented by specific federal legislation, the Navajo Nation did not adopt the *Fourteenth Amendment* in the exercise of its legislative jurisdiction, and "no provision in federal law provides for tribal-court jurisdiction over" actions implied directly under the *Fourteenth Amendment*. *533 U.S. at 367, 368*. A *Bivens*-style claim under the *Fourteenth Amendment* would prove no more removable to federal court than the *§ 1983* actions addressed in *Hicks*. *See id. at 368*. The *Hicks* Court's reasoning as to *§ 1983* actions seems equally applicable to any cause of action implied directly under the United States Constitution.

Plaintiffs invoke the Indian Civil Rights Act, *25 U.S.C.A. § 1302*, as a basis for their civil rights claims against the District. ICRA guides the exercise of the powers of tribal self-government, [**424] but does not apply to constrain the conduct of the State of Utah or its subdivisions. The Health District thus cannot violate that statute, and may not be haled into court on allegations of ICRA violations. [224] The same is true of the Navajo Bill of Rights, Navajo Nation Code, tit. 1, § § 1-9 (1995), which serves as a fundamental organic document of the Navajo Nation, but does not bind the United States or the States. [225]

[**425] [*1050] Plaintiffs' reliance on the United Nations' Universal Declaration of Human Rights as a legal footing for their civil rights claims against the Health District also proves to have been misplaced.

(*See* Navajo Ct. Cmplt. at *32 Kan. 646, 5 P 27* & Exh. 4; *id.* at 26 PP 242, 244 (equal protection).) The Supreme Court recently observed that "the Declaration does not of its own force impose obligations as a matter of international law," and by itself it cannot support creation of cause of action that a federal district court could hear under the applicable jurisdictional statutes. *Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 2767, 159 L. Ed. 2d 718 (2004).* [226] The Navajo courts may take a different view of the status of the Declaration under international law, but this court remains constrained by the Supreme Court's view that "a claim under the 'present-day law of nations' as an element of common law is circumscribed to 'norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.,'" namely violation of safe conduct, infringement of the rights of ambassadors, [**426] and piracy, and that those norms must be "specific, universal and obligatory," *id., 124 S. Ct. at 2761-2762, 2765*, and its view that the Universal Declaration of Human Rights is not quite universal enough. *Id. at 2767* (plaintiff "cannot say that the Declaration . . . establish[es] the relevant and applicable rule of international law"). [227]

[**427] Assuming that plaintiffs' assertion here and at the court of appeals that "they brought only Navajo law claims before the Navajo tribunal" is in fact correct, [228] then Riggs and Dickson's claims as to rights of free speech, due process and equal protection "as protected by the Navajo Nation" would need to find a footing in either the Navajo Preference in Employment Act [229] [*1051] or an as-yet-unspecified common-law cause of

action under Navajo law that protects "Navajo civil rights as defined within Navajo custom and traditions." [230] (December 28, 1999 Order at [19].)

But like other intentional torts, the Utah statute excepts injuries resulting from "violation of civil rights" from its general waiver as to injury claims. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004). *Seare v. University of Utah School of Medicine, 882 P.2d 673, 679 (Utah Ct. App. 1994)* ("the state has expressly [**430] declared that it maintains its immunity from civil rights claims. Utah Code Ann. § 63-30-10(2) . . . ."). [231] The Health District [*1052] thus remains immune from liability on those claims, even if brought in the designated forum.

[**431] **8. Summary**

Having reviewed the court's prior ruling concerning the sovereign immunity of the Health District defendants in light of subsequent developments and this court's examination of plaintiffs' claims and the Navajo court orders, this court concludes that adjudication of Riggs and Dickson's claims against San Juan Health Services District in the Navajo Nation District Court was barred by sovereign immunity. Adjudication in the Navajo court of Riggs' defamation claim against Wood in his individual capacity was not barred by the Utah Governmental Immunity Act, based upon that court's preliminary finding that Woods' conduct was "malicious," which excepts him from coverage under the Act, *see* Utah Code Ann. § 63-30-4(3)(b), (4)(a) (Supp. 2003) (repealed 2004).

SUMMARY & CONCLUSION

The Tenth Circuit's mandate in this case "require[d] a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions" in addressing the issues on remand concerning the extent [**432] of the Navajo court's jurisdiction. *309 F.3d at 1228* (quoting *National Farmers, 471 U.S. at 855-856* (footnote omitted)). As detailed herein, admittedly at some length, this court has sought to abide by that mandate in reaching its conclusions on those issues.

This court has examined with care each treaty, statute, regulation and reported court opinion cited by any party as bearing upon the issues on remand. This court has also perused the extensive legal literature discussing Indian tribal sovereignty; federal Indian policy; the allocation of jurisdiction among federal, state and tribal governments in the context of our federal system; and more specifically, the exercise of Indian tribal jurisdiction over non-Indians in light of *Montana* and its progeny. Some of the references shed more light on these subjects than others, but all have proven instructive in some respect.

This court has undertaken to make the best sense it can of the Supreme Court case law on the subject--including precedent that several Justices have already conceded is seemingly inconsistent, *see Nevada v. Hicks, 533 U.S. 353, 376, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)* (Souter, Kennedy & Thomas, [**433] JJ., concurring) [232]--and [*1053] in so doing, has sought to give due deference to the policies of the Congress and the Executive Branch, recognizing that those policies

have shaped "the metes and bounds of tribal sovereignty." *United States v. Lara, 541 U.S. 193 at 202, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).* The court has detailed its reasoning in that regard, in part because this court's reading of the relevant legal authority differs from that of counsel on all sides of this case. As best it can, the court has made explicit the specific reasons for that difference.

[**434] The court has also made the best sense it can out of a chaotic record, attempting to find order and sequence amidst shotgun pleadings rife with strident characterizations and prolix, meandering stream-of-consciousness argumentation. The preceding pages serve as the official record of that earnest effort.

So often, many claims are pleaded and many theories are argued, where one good claim or one sound theory would do. Labels too often displace facts, and characterization so often fails to perform the essential functions of description and sequence. Important issues are obfuscated by disjoint plaintiffs, unconnected defendants and obtuse allegations. *Rule 8* speaks volumes in its simple requirement that a pleading set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."

And any argument--particularly any legal argument--finds its true force in the soundness and clarity of its reasoning, not the depth and persistence of its animus.

For the reasons set forth in some detail above, this court concludes that based upon the findings of fact reflected in the Navajo court's December 28, 1999 and March 1, 2000 Orders, the Navajo Nation and the Navajo [**435] Nation District Court for the District of

Shiprock, New Mexico, had civil regulatory authority and adjudicative subject-matter jurisdiction, respectively, over the San Juan Health Services District with respect to its employment of plaintiffs Fred Riggs and Allison Dickson, and jurisdiction of at least some of the employment-related claims pleaded by those plaintiffs under *Navajo Nation Code* § 253(B), consistent with *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*. Non-Navajos and non-tribal entities who enter into employment relationships with Navajo members within the boundaries of the Navajo Nation have "enter[ed] consensual relationships with . . . its members" within the meaning of *Montana*'s first exception, and the Navajo courts have subject-matter jurisdiction of disputes between Navajos and nonmember employers arising out of those relationships. Employer-employee relationships involving tribal members likewise have a "direct effect on the . . . the economic security, or health or welfare of the tribe" within the meaning of *Montana*'s second exception, bringing those relationships within the limited scope of the Navajo Nation's inherent civil authority [**436] over non-Indians conducting activities on non-Indian fee lands within the reservation boundaries for that reason as well. In extending the coverage of the Navajo Preference in Employment Act to those relationships, the Navajo Nation exercised its lawful civil regulatory authority, an aspect of the Navajos' long-acknowledged power to "make their own laws and be ruled by them," *Williams v. Lee, 358 U.S. at 220*, reflecting its inherent sovereignty as recognized and enlarged by treaty and Acts of Congress. Plaintiffs Riggs and Dickson are entitled to declaratory relief, at least to that extent. *See 28 U.S.C.A. §§ 2201-2202 (1994)*.

The Navajo court also had subject-matter jurisdiction of plaintiffs' employment-related claims against defendant Roger Atcitty, a Navajo tribal member residing on [*1054] the Navajo Reservation. [233] For Riggs and Dickson, their claims against Atcitty reflect a dispute arising among tribal members, over which tribal court subject-matter jurisdiction is exclusive. *See Fisher v. District Court of the Sixteenth Jud. Dist., 424 U.S. 382, 386-389, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976).* The Navajo court also has exclusive subject-matter jurisdiction [**437] over Singer's claim against Atcitty, at least to the extent that her claim arose within Reservation boundaries. *See Williams v. Lee, 358 U.S. 217, 222-223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).*

Of Riggs and Dickson's claims against their employer, the San Juan Health Services District, it appears that those claims which seek directly to enforce the Navajo Preference in Employment Act were not properly before the Navajo Nation District Court at the time the three orders at issue were entered. The NPEA assigns the Office of Navajo Labor Relations and the Navajo Nation Labor Commission primary jurisdiction over alleged violations of its requirements. In its December 28, 1999 and March 1, 2000 Orders, the Navajo court made no findings invoking any exception to the requirement under Navajo law that plaintiffs [**438] must first exhaust their administrative remedies under the NPEA before seeking relief under that law in the Navajo courts. [234] Nor does it appear that plaintiffs had been dismissed by the Labor Commission, or that they were seeking to enforce any order of the Labor Commission in their Navajo court proceeding. The Navajo court's preliminary findings in

its December 28, 1999 and March 1, 2000 Orders do not establish a basis for exercising its jurisdiction over plaintiffs Riggs and Dickson's NPEA claims absent proof of exhaustion of the prescribed administrative remedies.

Aside from claims arising directly under the NPEA, the Navajo Nation District Court correctly concluded that it had subject-matter jurisdiction over plaintiffs Riggs and Dickson's employment-related common-law tort claims, particularly Mr. Riggs' defamation claim against the Health [**439] District and defendant Wood, alleging injury to his reputation--what amounts to an injury to Riggs' relationship with his peers and co-workers at the Montezuma Creek Clinic and member of his community on the Reservation.

Under controlling Supreme Court precedent, the Navajo Nation District Court did not have subject-matter jurisdiction over the claims of plaintiff Donna Singer, a non-Indian nonresident of the Navajo Reservation, against the Health District and the non-Indian defendants. *Strate v. A-1 Contrs., 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).* Nor did that court have subject-matter jurisdiction over San Juan County, the named San Juan County Commissioners, the San Juan County Attorney, County administrator Bailey, or the non-Navajo members of the Health District's governance board under *Navajo Nation Code*, tit. 7, § 253(B), based upon the limited preliminary factual findings set forth in that court's December 28, 1999 and March 1, 2000 Orders.

This court need not decide whether Navajo court's conclusion that plaintiffs Riggs and Dickson had standing to assert claims on behalf of the past, present

and future Navajo patients of the Montezuma Creek Clinic--*none* of whom [**440] appeared as plaintiffs in the Navajo court proceeding--was [*1055] correct, or whether the question of standing may or must be re-examined in this action as part of the jurisdictional analysis, because subsequent events have rendered moot the preliminary injunctive relief granted by the Navajo court on the patients' behalf in December of 1999; the County and Health District defendants had no participation in, or authority or control over the management and operation of the Montezuma Creek Clinic from and after January 1, 2000, when Utah Navajo Health Systems assumed responsibility for that facility under its contract with the Navajo Nation. Further enforcement of that relief--particularly for the benefit of unspecified, unidentified and absent plaintiffs--as against these defendants more than five years after that date would serve no practical purpose.

For essentially the same reason, much of the injunctive relief granted by the Navajo court in favor of plaintiffs Riggs and Dickson on their own pleaded employment-related claims was also rendered moot, and to that extent, the Navajo court's preliminary injunction is no longer capable of specific enforcement in this forum. As to the remainder [**441] of the relief granted, *viz.*, expungement of all "charges and writings" referring to the time card issue from plaintiff Riggs' personnel file, this court declines to enforce the preliminary injunctive relief on Riggs' tort law claims as a matter of either full faith and credit or comity because the Navajo court orders--by their express terms--are preliminary and interlocutory orders, not final judgments of that court. *See Restatement (Second) of Conflict of Laws § 107* (1971).

For essentially the same reason, much of the injunctive relief granted by the Navajo court in favor of plaintiffs Riggsand Dickson on their own pleaded employment-related claims was also rendered moot, and to that extent, the Navajo court's preliminary injunction is no longer capable of specific enforcement in this forum. As to the remainder of the relief granted, *viz.*, expungement of all "charges and writings" referring to the time card issue from plaintiff Riggs' personnel file, this court declines to enforce the preliminary injunctive relief on Riggs' tort law claims as a matter of either full faith and credit or comity because the Navajo court orders--by their express terms--are preliminary and interlocutory orders, not final judgments of that court. *See Restatement (Second) of Conflict of Laws* § 107 (1971).

The interlocutory nature of the three orders at issue also dooms plaintiffs' effort to enforce the other equitable relief granted them by the Navajo court, *viz.*, back pay, back benefits, etc. That relief calls for the payment of money, but in amounts that were not set forth with any particularity in the Navajo court's December 28, 1999, March 1, 2000 and March 6, 2000 Orders. Absent the requisite factual findings by the Navajo court liquidating those sums, the Navajo court orders leave this court with nothing to enforce.

Essentially the same is true as to the Navajo court's preliminary award of "attorney's fees, costs and expenses associated with these [**442] proceedings to date" in favor of the plaintiffs, but without specific findings as to amount. Without a definitive answer to the "how much" question, this court remains at a loss as to how to enforce another court's order requiring defendants to pay money to the plaintiffs.

In any event, adjudication of Riggs and Dickson's claims against the Health District was barred by the District's immunity as defined by the Utah Governmental Immunity Act. The State of Utah has not consented to suit against the State or its subdivisions in tribal courts. Its limited statutory waiver of that immunity extends only to the exclusive remedy under the Act in its exclusively designated forum, the Utah state district courts. While that limited waiver encompasses contract claims and claims involving injuries resulting from employee conduct, the Act excepts most intentional tort claims, including defamation, emotional distress, interference with contract, and civil rights violations, from the waiver.

Adjudication in the Navajo Nation District Court of the plaintiffs' claims against defendant Atcitty arising from his conduct as a member of the Health District's governing board is likewise barred by the Utah [**443] Governmental Immunity Act, absent a finding that Atcitty acted due to fraud or malice.

This court gives effect to the limited nature of that waiver under the principles of sovereign immunity articulated in *Montana v. Gilham, 133 F.3d 1133, 1136-1140* [*1056] *(9th Cir. 1997)*, and recognizing that under Navajo case law decided since the orders at issue were entered, the Navajo Supreme Court would likely honor the Health District's immunity under evolving principles of comity and reciprocity. *See Office of Navajo Labor Relations ex rel Bailon v. Central Consolidated School District No. 22*, No. SC-CV-13-98 (Navajo S. Ct. 06/05/2003), at P [25], *available at* http://www.tribal-institute.org/opinions/2003.NANN.0000007.htm.

Only Riggs' defamation claim against defendant Wood was excepted from the effect of the immunity afforded by the Utah Governmental Immunity Act, based upon the Navajo court's preliminary finding that Wood acted through malice in publishing "the phony fraud charge that still maliciously clouds Mr. Riggs' . . . name." (December 28, 1999 Order at [15].)

For all of the reasons explained above,

IT IS ORDERED that the Plaintiffs' Motion for Summary [**444] Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504), is GRANTED IN PART, but only to the extent that plaintiffs are entitled to entry of judgment declaring that consistent with *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, the Navajo Nation and the Navajo Nation District Court for the District of Shiprock, New Mexico, had civil regulatory authority and adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B), respectively, over the San Juan Health Services District with respect to its employment relationships with plaintiffs Fred Riggs and Allison Dickson; the Navajo court also had subject-matter jurisdiction of plaintiff Riggs' defamation claim against defendant Wood, and of plaintiffs Singer, Riggs and Dickson's employment-related claims against defendant Atcitty, under *Navajo Nation Code*, tit. 7, § 253(B), consistent with *Montana v. United States* and *Nelson v. Pfizer, Inc.*, among other authorities; based upon the Navajo court's preliminary [**445] finding that Wood acted through malice, the Utah Governmental Immunity Act

does not bar Riggs' claim against Wood; the plaintiffs' motion is DENIED as to all claims asserted by plaintiff Donna Singer, with the exception of her claim against defendant Atcitty, a Navajo member, because the Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction of her claims against the non-Indian defendants under *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, and *Strate v. Al Contrs., 520 U.S. 438 (1997)*; the plaintiffs' motion is DENIED as to defendants San Juan County, San Juan County Commissioners Tyron Lewis and Bill Redd, the San Juan County Attorney Craig Halls and County administrator Bailey because the Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B) of plaintiffs Riggs and Dickson's claims against these defendants; and the plaintiffs' motion is DENIED in all other respects because, *inter alia*, the Navajo court orders that plaintiffs seek to enforce in this forum [**446] are non-final and interlocutory in nature, and in large part have been rendered moot;

IT IS FURTHER ORDERED that San Juan Health District Defendants' Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), is GRANTED IN PART, to the extent that the defendants are entitled to entry of a judgment declaring that the [*1057] Navajo Nation District Court for the District of Shiprock, New Mexico did not have adjudicative subject-matter jurisdiction under *Navajo Nation Code*, tit. 7, § 253(B) of the plaintiffs' claims against defendants John Lewis, Karen Adams, Patsy Shumway, and Lauren Schafer; that the Utah

Governmental Immunity Act bars adjudication in the Navajo Nation District Court of plaintiffs' claims against Atcitty arising from his conduct as a member of the Health District governing board; the Act also bars adjudication in the Navajo court of Riggs and Dickson's claims against the San Juan Health Services District because its limited waiver of the District's governmental immunity does not extend to adjudication of individual claims against the District in Indian tribal courts; and

DATED this 12 day of October, 2005.

BY THE COURT:

BRUCE S. JENKINS

United States Senior District Judge

Footnotes

1 In a number of instances, Mr. Dickson's name was spelled "Alison" rather than "Allison" in plaintiffs' pleadings, affidavits, and other papers. Except when it would alter a quotation, this court uses the "Allison" spelling, as it appears on this record to be the one Mr. Dickson uses in writing his own name.

2 Plaintiffs "incorporate[d] the briefing done in their Supreme Court petition and Writ of Mandamus petitions into this briefing," apparently referring to their "Petition for a Writ of Certiorari," *Riggs v. San Juan County, 539 U.S. 975, 124 S. Ct. 22, 156 L. Ed. 2d 683 (U.S.S.Ct., filed February 6, 2003)*, and "Petition for a Writ of Mandamus and Prohibition," *In re: Riggs, et al. v. San Juan County, et al.*, Case No. 03-4036 (10th Cir., filed February 13, 2003), copies of which are lodged in this court's file. Those briefs are hereinafter

cited as "Pltfs' Cert. Pet." and "Pltfs' Mandamus Pet.," respectively.

The plaintiffs' Tenth Circuit mandamus petition was denied on February 20, 2003, and certiorari was denied on June 2, 2003, *see 539 U.S. 902, 123 S. Ct. 2246, 156 L. Ed. 2d 11 (2003)*. Plaintiffs also filed in the Supreme Court a Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 123 S. Ct. 2665, 156 L. Ed. 2d 653, 2003 WL 22428213 (U.S.S.Ct. 2003)*, which was denied on October 6, 2003, *see 540 U.S. 810, 124 S. Ct. 105, 157 L. Ed. 2d 260 (2003)*. The Supreme Court denied rehearing on plaintiffs' petition on December 1, 2003, *see 540 U.S. 1069, 124 S. Ct. 864, 157 L. Ed. 2d 734 (2003)*.

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3 As it turns out, this submission consisted of exhibits that were supposed to be appended to "Plaintiffs' Motion to Allow Plaintiffs Corrections of Factual Assertions in the February 24, 2003 Hearing,"(dkt. no. 571), which was served on opposing counsel on or about February 24, 2003, but was not filed with the court until November 18, 2003. *Cf. Fed. R. Civ. P. 5(d)*.

4 (*See also* "Plaintiffs' Motion to Compel," filed March 6, 2003 (dkt. no. 507); Memorandum in Support of the Plaintiffs' Motion to Compel, filed March 6, 2003 (dkt. no. 508).) This "motion to compel" did not concern discovery or disclosure. *Cf. Fed. R. Civ. P. 37(a)*. Instead, the Part II Plaintiffs sought an order requiring the defendants to brief the jurisdictional question in the manner consistent with language found in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)*, to "express their waiver of any claims of immunity for this

Court's jurisdiction," and to "brief this Article III court's subject matter jurisdiction to define . . . the Navajo Court's subject matter jurisdiction in any way other than as Congress defines tribal court jurisdiction." (Plaintiffs' Motion to Compel, filed March 6, 2003 (dkt. no. 507), at 2.) The motion was briefed, (*see* Health District Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel, etc., filed March 20, 2003 (dkt. no. 524); San Juan County Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel, filed March 24, 2003 (dkt. no. 526); Plaintiffs' Reply to the County Defendant's Opposition to the Plaintiffs' Motion to Compel a Nat'l Farmers Analysis, filed March 28, 2003 (dkt. no. 537)); was argued at the December 19, 2003 hearing; was taken under advisement; and was ultimately denied. (*See* Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 1-2.)

Plaintiffs' "Motion to Allow Plaintiffs 'Pertinent Parts of the Navajo Court Record' as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants be Accepted as Evidence for the Enforcing [of] Navajo Court Orders," was filed on November 17, 2003 (dkt. no. 568), with a memorandum in support (dkt. no. 569).) It appears that this motion was served on opposing counsel on or about February 24, 2003, but was not filed with the court until November 17, 2003. *Cf. Fed. R. Civ. P. 5(d).* The defendants had filed memoranda responding to this motion on March 11, 2003. (*See* San Juan County Defendants' Memorandum in Opposition to Plaintiffs' Motion to Allow Parts of the Navajo Court Record Be Accepted as Evidence for Enforcing Navajo Orders, filed March 11, 2003 (dkt. no. 512); Health District

Defendants' "Memorandum in Opposition to Motion to Allow Plaintiffs' Pertinent Parts of the Navajo Court Record as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants [to] Be Accepted as Evidence for the Enforcing [sic] Navajo Orders," filed March 11, 2003 (dkt. no. 515).) Plaintiffs replied. (Plaintiffs' Reply to Defendant's Memorandum in Opposition to the Plaintiffs' Submitting Parts of the Navajo Court Record, filed March 18, 2003 (dkt. no. 520);"Plaintiffs' Reply to the District/County Memorandum Opposition to Allow Plnt's' Pertinent Parts of the Navajo Record, [etc.]," filed March 31, 2003 (dkt. no. 539).) The court granted this motion in part. (*See infra* note 12; Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 2.)

It also appears that plaintiffs' "Motion to Allow Plaintiffs Corrections of Factual Assertions in the February 24, 2003 Hearing" was not filed until November 18, 2003 (dkt. no. 571), with a memorandum in support (dkt. no. 570); ironically preceded by opposition memoranda, and a reply. (Plaintiffs' Reply to Defendant's Memorandum in Opposition to the Plaintiffs' Correction of Record for February 24, 2003, filed March 18, 2003 (dkt. no. 519).)

On March 13, 2003, plaintiffs filed a motion attacking the defendants' sovereign immunity defense. (*See* Plaintiffs' Motion to Strike All Defendants' Cases re: "State" Immunity, filed March 13, 2003 (dkt. no. 516); Memorandum in Support of Motion to Strike All Defendants' Cases re: "State" Immunity, filed March 13, 2003 (dkt. no. 517).) This motion was discussed briefly at the December 19, 2003 hearing, *see* Transcript of Hearing, dated December 19, 2003 ("Tr. 12/19/03"), at

6:21-7:1 (the Court), and was stricken by order of the court as premature. (*See* Order on Motions Decided at December 19, 2003 Hearing, filed on January 29, 2004 (dkt. no. 603), at 3.) Further, Plaintiffs' Motion for Declaratory Judgment with Regard to Government Immunity, filed August 16, 2002 (dkt. no. 407), was likewise stricken as premature. (*Id.*)

Plaintiffs filed additional motions and memoranda in March of 2003. (*See* Plaintiffs' Motion for Immediate Enforcement of Navajo Orders against the County and County Commissioners Stevens and Morgan, filed March 18, 2003 (dkt. no. 521); Memorandum in Support of Plaintiffs' Motion for the Immediate Enforcement of Navajo Orders against the County and the County Commissioners Stevens and Morgan, filed March 18, 2003 (dkt. no. 522); Plaintiffs' Motion to Correct Their Submission of the BIA Contract with the Navajo Nation Judicial Program, filed March 28, 2003 (dkt. no. 535); "Plaintiffs' Reply to the District/County (1) Memorandum in Opposition to the Plaintiffs' Motion to Compel; (2) Summary Judgment Motion; (3) Motion to Strike State Cases and (4) Response to th Def's Gag Order Motion; (5) Response to Def's Opposition to the Pint's Motion for Reconsideration," filed March 31, 2003 (dkt. no. 540).) The defendants, in turn, filed responsive memoranda. (*See, e.g.*, Health District Defendants' Memorandum in Opposition to Plaintiffs' Motion to Correct Their Submission of the BIA Contract with the Navajo Nation Judicial Program, filed April 17, 2003 (dkt. no. 554).)

5 Shortly before the December 19th hearing, plaintiffs' counsel filed motions seeking to "remand" this action in favor of requiring the defendants to exhaust tribal

appellate remedies as to the jurisdictional question and other issues. (*See* Plaintiffs' Motion for an Order to Reschedule the Hearing of Dec. 19th and Schedule a Hearing for the Motion to Remand or Allow Plaintiffs' to Dismiss their Action," filed December 12, 2003 (dkt. no. 575); Plaintiffs' Motion for an Order of Remand to Navajo Court or in the Alternative an Order Allowing Plaintiffs' to Withdraw their Complaint for Enforcement of Navajo Court Orders, filed December 12, 2003 (dkt. no. 579).) There was some preliminary discussion of plaintiffs' "remand" concept at the December 19th hearing, (*see* Tr. 12/19/03, at 25:11-27:6, 51:4-52:6, 53:5-12), but the defendants had not yet filed written responses. Thereafter, the San Juan County defendants filed a memorandum opposing the "remand" motion, joined by the Health District defendants, to which the plaintiffs then filed a reply. (*See* San Juan County Defendants Memorandum in Opposition to Plaintiffs' Motion for an Order of Remand to Navajo Court or in the Alternative an Order Allowing Plaintiffs' to Withdraw their Complaint for Enforcement of Navajo Court Orders, filed December 31, 2003 (dkt. no. 586); Joinder in San Juan County Defendants' Memorandum, etc., filed January 2, 2004 (dkt. no. 587); The Health District Defendants' Joinder in San Juan County Defendants' Memorandum, etc., filed January 6, 2004 (dkt. no. 588); Plaintiffs' Reply to and Motion to Strike or Dismiss Defendants' Opposition to Plaintiffs' Motion to Remand or in the Alternative to Withdraw the Complaint Without Prejudice, filed January 9, 2004 (dkt. no. 591).) Subsequently, however, counsel indicated that the "remand" motion was to be withdrawn, and later, deferred "until the Court and the parties have disposed of the prior motions," (Letter from Ms. Rose to the Court (via fax), dated September

28, 2004, at [2]); the remand motion was not listed by counsel as among the matters still needing to be addressed as of the time of the September 28, 2004 status conference. (*See* Transcript of Hearing, dated September 28, 2004, *passim*.)
[**17]

6 *See* "Compendium of Exhibits in Support of Enforcing Navajo Court Orders Under Full Faith and Credit or Remanding the Case for Exhaustion," duplicate copies of which were submitted as Plaintiffs' Exhibits "A" and "B" (hereinafter cited as **"Pltfs' 12/19/03 Compendium A/B"**).)

7 (*See* "Motion to Correct Facts Asserted in the 12-19-03 Hearing and Supplement the Hearing Record," filed on December 19, 2003 (dkt. no. 583), and memorandum in support (dkt. no. 584); "Plaintiffs' Notice to the Court of a Pending Indian Law Decision in U.S. v. Lara," filed February 3, 2004 (dkt. no. 607); "Plaintiffs' Motion for an Order Granting Parties Permission to Brief the U.S. v. Lara Supreme Court Decision," filed April 20, 2004 (dkt. no. 641), and supporting memorandum (dkt. no. 642); Health District Defendants' Memorandum in Opposition to Plaintiffs' Motion for an Order Granting Parties Permission to Brief the U.S. v. Lara Supreme Court Decision, filed May 5, 2004 (dkt. no. 643); "Plaintiffs' Motion for this Court to Address the Defendants' Immunity Issue and Full Faith and Credit Issue in any Order on Jurisdiction," filed September 24, 2004 (dkt. no. 661), with supporting memorandum (dkt. no. 662).)

Plaintiffs' counsel also submitted proposed forms of order finding that the Navajo court had subject matter

jurisdiction (currently lodged in the court's file), precipitating a flurry of written objections filed by the defendants, to which plaintiffs filed a reply. (*See* San Juan County Defendants' "Objection to Plaintiffs' Order Finding the Navajo Court Had Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations," filed January 14, 2004 (dkt. no. 593); Health District Defendants' "Objection to Plaintiffs' Proposed 'Order' Finding the Navajo Court Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations," filed January 14, 2004 (dkt. no. 594); Health District Defendants' "Objection to the Plaintiffs' Proposed Orders Finding the Navajo Court Subject Matter Jurisdiction Over Navajo Nation Law and Indian Civil Rights Act Violations and Memorandum in Opposition to Plaintiffs' Motion to Strike or Dismiss," filed January 20, 2004 (dkt. no. 596); San Juan County Defendants' Joinder in the Health District Defendants' Objection, etc. [dkt. no. 596], filed January 22, 2004 (dkt. no. 598); Plaintiffs' Reply to Defendants' Objections to the Plaintiffs' Proposed Orders Supporting Navajo Nation Court Jurisdiction, filed January 26, 2004 (dkt. no. 600); Objection of the San Juan Health Service Defendants to Plaintiffs' Proposed Order Finding the Navajo Court Had Subject Matter Jurisdiction and Proposed Order Allowing Withdrawal of the Complaint Without Prejudice for Further Fact Finding in Light of Supreme . . . Court Rulings, filed January 27, 2004 (dkt. no. 601); Plaintiffs' Reply to Attorney Harrison's Objection to the Plaintiffs' Proposed Orders and Motion to Strike the Objection, filed January 29, 2004 (dkt. no. 605); Plaintiffs' Motion to Strike Mr. Harrison's Objection to the Proposed Orders Finding the Navajo Court Had Subject Matter Jurisdiction, filed January

30, 2004 (dkt. no. 606); Health District Defendants' Response to Plaintiffs' Motion to Strike Mr. Harrison's Objection to the Proposed Orders Finding the Navajo Court Had Subject Matter Jurisdiction, filed February 11, 2004 (dkt. no. 608); Plaintiffs' "Reply to Mr. Harrison's February 11, Response," filed February 20, 2004 (dkt. no. 613).)

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8 Those authorities include *Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003)*; *Jinks v. Richland County, 538 U.S. 456, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)*; *Cook County v. United States ex rel. Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003)*; *Prairie Band of Potawatomi Nation v. Wagnon, 402 F.3d 1015 (10th Cir. 2005)*; *Prairie Band of Potawatomi Nation v. Richards, 379 F.3d 979 (10th Cir. 2004)*; *Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139 (10th Cir. 2004)*; *Skull Valley Band Of Goshute Indians v. Nielson, 376 F.3d 1223, 198 A.L.R. Fed. 741, 34 Envtl. L. Rep. 20,064 (10th Cir. 2004), petition for writ of certiorari filed, 163 L. Ed. 2d 626, 2005 U.S. LEXIS 9049 (U.S. 2005)*; *Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004)*; *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Comm'n, 327 F.3d 1019 (10th Cir. 2003)*; *cert. denied sub nom. Ashcroft v. Seneca-Cayuga Tribe of Oklahoma, 540 U.S. 1218, 124 S. Ct. 1505, 158 L. Ed. 2d 153 (2004)*; *Cabazon Band of Mission Indians v. Smith, 388 F.3d 691 (9th Cir. 2004)*; *Coeur D 'Alene Tribe of Idaho v. Hammond, 384 F.3d 674 (9th Cir. 2004), cert. denied, 543 U.S. 1187, 125 S. Ct. 1397, 161 L. Ed. 2d 190 (2005)*; *Boozer v. Wilder, 381 F.3d 931 (9th Cir. 2004)*; *Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004)*; *United States v. Archambault, 97 Fed. Appx. 59, 2004 WL 1058069 (8th*

Cir. 2004); Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan, 369 F.3d 960 (6th Cir. 2004); Marathon Oil Co. v. Johnston, 2004 U.S. Dist. LEXIS 29067, Case No. 03-CV-1031J (D. Wyo., decided June 1, 2004); Azure-Lone Fight v. Cain, 317 F. Supp.2d 1148 (D.N.D. 2004); Johnston v. Marathon Oil Co., Case No. CV-02-010 (Shoshone & Arapahoe Trib. Ct., decided January 7, 2005); *Judy v. White*, No. SC-CV-35-02 (Navajo S. Ct. 08/02/2004); *Ackerman v. Edwards, 121 Cal. App. 4th 946, 17 Cal. Rptr. 3d 517 (Ct. App. 3d Dist. 2004); State of South Dakota v. Cummings, 2004 SD 56, 679 N.W.2d 484; Rodriguez v. Wong, 119 Wash. App. 636, 82 P.3d 263 (2004).*

On April 4, 2005, plaintiffs' counsel also filed a further written argument as to the issues on remand. The court struck the filing because of counsel's failure to comply with the court's Local Rules concerning supplemental memoranda and citations to supplemental authority, *see DUCivR 7-1(b)(4), DUCivR 7-2.* (*See* Order re: Plaintiffs' April 4, 2005 Motion, filed April 5, 2005 (dkt. no. 720).)document entitled "Plaintiffs' Motion for an Order Enforcing Navajo Court Orders," (dkt. no. 719), which consisted of a citation to supplemental authority buttressed by

9 (*See* Plaintiffs' Motion to Refer Case to Mediation, Filed May 10, 2004 (dkt. no. 644), and supporting memorandum (dkt. no. 645); Plaintiffs' Motion for Settlement Conference with the County and County Defendants, filed June 7, 2004 (dkt. no. 652), and supporting memorandum (dkt. no. 653).)

10 Thereafter, plaintiffs' counsel filed a series of motions involving the Part I Plaintiffs (MacArthur, Lyman and Valdez), as well as two motions to amend the complaint, primarily involving revisions to the Part I Plaintiffs' claims. On June 13, 2005, this court entered a Memorandum Decision & Order detailing the reasons for the dismissal of the Part I Plaintiffs' claims--claims which had previously been disposed of pursuant to *Fed. R. Civ. P. 16(c)(1)* in the context of the Final Pretrial Conference on November 14 and 15, 2002. (*See* Memorandum Decision & Order, filed June 13, 2005 (dkt. no 742), *passim.*)

11 Former County Commissioner Mark Maryboy was also named as a defendant in the Navajo court, but has since been dismissed as a defendant in this action and is not now before this court. (*See* Order re: Dismissal of Defendant Mark Maryboy, filed November 29, 2001 (dkt. no. 234).) In this action, Commissioner Maryboy had been sued solely in his official capacity, which as a practical matter "is the same as a suit 'against [the] entity of which [the] officer is an agent," in this case, San Juan County, which remains a named defendant in this action. *McMillian v. Monroe County, 520 U.S. 781, 785 n.2, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997)* (quoting *Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)* (quoting *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1975))*). Recalling that an adverse judgment in an "official capacity" suit "'imposes liability on the entity that [the officer] represents,'" *id. at 785 n.2* (quoting *Brandon v. Holt, 469 U.S. 464, 471, 105 S. Ct. 873, 83 L. Ed. 2d 878 (1985))*, and noting that the plaintiffs sought no specific remedy as against former Commissioner Maryboy--in contrast to other named individual

defendants--this court saw no need to prolong former Commissioner Maryboy's presence as a defendant in this case.

And essentially the same may be said for defendant Shumway, also sued only in her official capacity. Plaintiffs' counsel indicated to the United States Supreme Court in 2003 that Ms. Shumway is no longer a defendant in this action. (*See* Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 123 S. Ct. 2665, 156 L. Ed. 2d 653, 2003 WL 22428213 (U.S.S.Ct. 2003)*, at iv ("Previously Commissioner Mark Maryboy and Patsy Shumway were named in their official capacities only, and have since left office and are no longer parties.").)

Mary Nielson (a/k/a Mary Nielsen), the Health District financial officer, was listed as a defendant in plaintiffs' original Complaint (Navajo Ct. Cmplt. at 1, 2 Idaho 44, 3 P 10), (District CFO); but is not listed in the caption of the three Navajo court orders. Nor was she named as a defendant in this case.

12 Though filed on November 8, 2002--two days *after* the plaintiffs' "*Rule 15* Motion to Amend and Supplement Complaint to Conform to the Evidence & The 10th Cir. Court 10-7-02 Opinion," filed November 6, 2002 (dkt. no. 438)--this three-inch-thick compendium of documents purported to be "attached to the amended Complaint" and "incorporated into the complaint." ("Pertinent Parts of the Navajo Court Record As Attachment to the Amended Complaint," received November 8, 2002 (dkt. no. 438 note), at [1].) The plaintiffs' *Rule 15* motion was granted on June 13, 2005, *nunc pro tunc* to November 14, 2002, (*see* Memorandum Decision & Order, filed June 13, 2005 (dkt. no. 742), at

187), and the Amended Complaint was filed on June 14, 2005 (dkt. no. 744), together with four attached documents originally submitted with the proposed Amended Complaint on November 6, 2002. However, the plaintiffs' "Pertinent Parts" compendium was not embraced in that filing.

The plaintiffs had previously filed a "Motion to Allow Plaintiffs 'Pertinent Parts of the Navajo Court Record' as Originally Served on Navajo Court Defendants and in Possession of the Court and Defendants be Accepted as Evidence for the Enforcing [of] Navajo Court Orders," filed November 17, 2003 (dkt. no. 568). This court had already granted that motion in part, *viz.*, "to the extent that the submitted documents shall be received as evidentiary exhibits." (Order re: Pending Motions, filed March 30, 2005 (dkt. no. 718), at 2.) The plaintiffs' "Pertinent Parts" compendium thus remains a part of the record in this action as a compilation of *evidentiary exhibits*, rather than as a part of the Amended Complaint itself, and is hereinafter cited as "**Pertinent Parts Navajo Ct. R.**"

[**25]

13 It appears that the plaintiffs' original Navajo court complaint was accompanied by a series of documentary "attachments," including the plaintiffs' ONLR complaints, a legal memorandum discussing jurisdictional issues, and 65 evidentiary exhibits. (*See* Pertinent Parts Navajo Ct. R. ("Memorandum SMJ" and "Table of Exhibits 1-65" Tabs).) For purposes of this discussion, the plaintiffs' original Navajo court complaint and all of its attachments are treated as a single pleading.

14 Memoranda attached to the original tribal court complaint refer to Ms. Singer receiving overtime compensation based upon her time cards. (Navajo Ct. Cmplt. at Exhs. 25, 32.)

15 Her public comments apparently provoked some reaction within the SJHSD. Ms. Singer recounts that on November 25, 1998, SJHSD financial officer Mary Nielson told her "All I can say is that you made some people very angry with your questions and comments at [the] board meeting." (Navajo Ct. Cmplt. at Exh.64, at [4].) When Ms. Singer met privately with Reid Wood for the first time on November 19th, she recalls him beginning by saying "You need to remember who you work for," without further explanation of the import of that comment. (*Id.* at Exh. 64, at [3].) Wood terminated Ms. Singer's employment two weeks later. (*Id.* at Exh. 64, at [4]-[5].)

16 Before the Office of Navajo Labor Relations, Ms. Singer sought similar relief, including an award of "$ 250,000 for recompense for nearly losing my life from the stress this caused me," the "immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood," to "be taken off time cards as an legally exempt manager," and that "the same discipline I received," *viz.*, termination of employment, "be given to Reid Wood, for any fraudulent misrepresentations Reid Wood made to the board and/or Rick Bailey," and "be given to Mary Nielsen for not obeying the SJHSD directive to give Montezuma Creek the software it needs for billing, and for retaliation and threats against my witnesses." (Pertinent Parts Navajo Ct. R. at ("ONLR Complaint" Tab).)

17 Moreover, Wood's allegation that Ms. Singer had "also approved another employee's time card that was incorrect"--part of the justification for her termination--appears to refer to Mr. Riggs' November 22 time card. (Navajo Ct. Cmplt. at Exh. 36.) Yet, according to the plaintiffs, Ms. Singer was not Mr. Riggs' supervisor and was not responsible for approving his time cards; they allege that Reid Wood was Mr. Riggs' supervisor and bore that responsibility. (*Id.* at 8 PP 55-58.)

18 Mr. Riggs also alleges that Reid Wood offered Mr. Riggs the position of manager of the Montezuma Creek Clinic that had recently been vacated by Ms. Singer's termination. (Navajo Ct. Cmplt. at 10 P 77 & Exh. 45, at P 14.) He recounted that Wood withdrew the offer when Riggs told Wood that the action taken against Riggs had been discriminatory. (*Id.* at 10 P 80 & Exh. 45, at PP 16-17.)

19 The Part II Plaintiffs point to the Utah Special District Personnel Management Act, Utah Code Ann. § 17A-1-601 through 17A-1-604 (2004), enacted in 1992. (*See, e.g.*, Navajo Ct. Cmplt. at 16 P 149 ("SJHSD does not adhere to merit system principals [sic] of the Utah Code 17A-1[-601] through 603.").) That statute provides that "[a] merit system of personnel administration for the special districts of the state of Utah, their departments, offices, and agencies, except as otherwise specifically provided, is established," Utah Code Ann. § 17A-1-601(2) (2004), and states that "it is the policy of this state that each special district *may establish* a personnel system administered in a manner that will provide for the effective implementation of the following merit principles:"

(1) Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

(2) Provision of equitable and adequate compensation.

(3) Training of employees as needed to assure high-quality performance.

(4) Retention of employees on the basis of the adequacy of their performance, and separation of employees whose inadequate performance cannot be corrected.

(5) Fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, or disability, and with proper regard for their privacy and constitutional rights as citizens.

(6) Provision of information to employees regarding their political rights and prohibited practices under the Hatch Political Activities Act, *5 U.S.C. Sec. 1501 through 1508* et seq.

(7) Provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

Utah Code Ann. § 17A-1-603 (2004) (emphasis added). As plaintiffs' counsel now insists that Singer, Riggs and Dickson were pursuing claims before the Navajo court solely under Navajo law, this court need not address

the effect of this statute upon the Health District, or its applicability to District conduct relating to the plaintiffs.

20 Before the ONLR, Mr. Riggs further requested that "the same discipline Donna Singer received for 'fraud',"--termination of employment--"be given to Reid Wood, for any fraudulent misrepresentations Reid Wood made to the [District] Board and/or Rick Bailey," and "the immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood." (Pertinent Parts Navajo Ct. R. ("ONLR Complaint" Tab).) He also asked "to be taken off of time cards and put back on salary." (*Id.*)

The "CIB policy" refers to an alleged requirement by the Health District that patients seeking non-emergency medical treatment at District facilities in 1999 furnish proof of their Medicare, Medicaid or Indian Health Service eligibility, the latter by presentation of a patient's "certificate of Indian blood" or "CIB." (Navajo Ct. Cmplt. at 27-30 PP 249-267.) Plaintiffs allege that under this District policy "no Indians without their 'CIB' on file or on their person would receive treatment," in violation of federal regulations. (*Id.* at 27 P 249, 28 P 256.)

21 In addition to the District's written policy, Dickson joined Singer and Riggs in invoking an array of legal bases for his claims,

> including but not limited to, the *Navajo Nation Bill of Rights;* the *Navajo Nation Code; . . . Navajo Custom and Traditions;* the *Navajo Preference in Employment Act;* including the

United Nations Declaration of Human Rights; United States Bill of Rights; the *Constitution of the State of Utah,* and the *Utah Code* under 17A, *9-9-208, 9-9-209.*

(Navajo Ct. Cmplt. at 32 Kan. 646, 5 P 27 & Exhs. 2-5, 12, and 21.) At least in the referenced documents, the court finds nothing that expressly guaranties that a person hired as a "temporary" employee would be legally entitled to the tenure and benefits of a "regular" or "permanent" employee, based upon the duration of his or her "temporary" employment, or otherwise.

22 A "dog tag" may refer either to "[a] metal identification disk attached to a dog's collar," or "[a] metal identification tag worn on a chain around the neck by members of the armed forces." *The American Heritage Dictionary of the English Language* 548 (3d ed. 1992); *accord Webster's New World College Dictionary* 423 (4th ed. 1999) ("an identification tag or license tag for a dog" or "a military identification tag worn about the neck"). Which connotation Mr. Wood had in mind on January 5, 1999 is unknown.

23 Before the Office of Navajo Labor Relations, Mr. Dickson requested "$ 25,000 for recompense for the trouble I have been put through to obtain my rights; the discrimination against me in violation of policy, and laws; and the insults to my heritage that I witnesses, and to demonstrate that discrimination is illegal and expensive." (Pertinent Parts Navajo Ct. R. at ("ONLR Complaint" Tab).)

[**44]

24 Before the Office of Navajo Labor Relations, Mr. Dickson joined Ms. Singer and Mr. Riggs in seeking

"the immediate obliteration of the CIB policy implemented by Mary Nielsen and Reid Wood." (Pertinent Parts Navajo Ct. R. ("ONLR Complaint" Tab).)

25 Plaintiffs' "equal protection" claim presents a laundry list of grievances, beginning with the failure of the County and the Health District to implement "a cross cultural training program for non-Indian administrators, supervisors, or managers as required by the [Navajo Preference in Employment Act," (*id.* at 26 P 246), and the imposition of the alleged "CIB policy," (*id.* at 27-30 PP 249-267, 269), to the promotion of Mr. Wood to CEO of the District "two months earlier than his six months initial probation period," (*id.* at 12 Mont. 163, 30 P 268), alleged expense shifting among District facilities (*id.* at 30-31 PP 272-276), and $ 40,000 of Utah Navajo Trust Fund money that "has not been accounted for in SJHSD public board meeting records," (*id.* at 30 P 271).

[**47]

26 (*See, e.g.*, Navajo Ct. Cmplt. at 22 P 217 ("But for the hiring of Mr. Wood, the employee plaintiffs may never have been harmed.").)

27 Plaintiffs plead no factual allegations in PP 221-229 pertaining to their "tortious interference" theory apart from those pertaining as to their defamation claim, though the essential elements of the two theories differ. *Compare Restatement (Second) of Torts § 766B* (1979) (intentional interference with prospective contractual relation) *with id. § 558* (1977) (elements of defamation). Plaintiffs' "theft" claim likewise deals with alleged injury to the same legal interest as their defamation claim. (*See* Navajo Ct. Cmplt. at 19 Ore. 288, 24 P 232

("Mrs. Singer and Mr. Riggs had their reputations taken . . ."); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 113, at 797 (5th ed. 1984) (under the law of defamation, "the interest protected is that of reputation").

This court will treat all three "theories" as pleading one cause of action: defamation.

28 According to the plaintiffs, "Mrs. Singer and Mr. Riggs had their reputations taken and all the Plaintiffs had their speech taken in violation of Article 12 of the United Nations Declaration of Human Rights." (*Id.* at 19 Ore. 288, 24 P 232.)
[**48]
29 "In Utah, a claim for breach of fiduciary duty is an independent tort that, on occasion, arises from a contractual duty . . . ." *Norman v. Arnold, 2002 UT 81, P 35, 57 P.3d 997, 1006.*

30 Plaintiffs' "malfeasance" claim presented another laundry list of more generalized allegations, (*e.g.*, *id.* at 37 P 329 ("Courts have found schools and juries in San Juan County to be discriminatory"); P 330 ("Government entities in San Juan County have prolonged litigation for decades in various suits")), and legal conclusions, (*e.g.*, *id.* at 26 Ore. 453, 38 P 338 ("SJHSD is not an at will employer")), interspersed with more fact-specific allegations (*e.g.*, *id.* at 26 Ore. 405, 38 P 342 ("Mrs. Shafer knew Mrs. Singer was not a dishonest person and did nothing to help her"))--a few of which may even have been germane to the plaintiffs' other legal theories (*e.g.*, *id.* at 39 P 347 ("Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status")).

31 In May of 2003, plaintiffs' counsel advised the United States Supreme Court that

> in the Complaint, to the degree the state nonfeasance, malfeasance, and misfeasance claims are found, *Petitioners acknowledge the Navajo Court will have no authority to rule upon them as state claims*, but they do serve as a backdrop to understand the level of deliberateness of harm by these quasimunicipal organizations and officers. Otherwise, all tort claims are Navajo tort claims. See, 7 N.N.C. 701, *infra*.

(Petition for Writ of Mandamus and Prohibition, *In re Riggs*, 539 U.S. 956, 123 S. Ct. 2665, 156 L. Ed. 2d 653, 2003 WL 22428213 (U.S.S.Ct. 2003), at 5 n.12.) Viewing these claims solely as a "backdrop," then, this Court need not address them further. *But cf.* Navajo R. Civ. P. 11.

32 *Cf.* "Findings, Opinion and Judgment at Preliminary Injunction," dated December 28, 1999, in *Donna Singer, et al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) (a [illegible] copy of which is annexed to the Amended Complaint (dkt. no. 744), at [11] ("At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor employment issue.")).

33 The Supplemental Pleading also demanded that the defendants "and each of them, jointly and severally [sic] publicly retract all defamatory and other libelous statements made of any of the plaintiffs as stated

litigants or counsels herein," to be accomplished "by publication in the local newspapers, and radio stations of local circulation . . . and the general coverage of the Navajo Nation, . . . and issuing statements of apology which are deemed appropriate by this Court and the plaintiffs by prior review; . . ." (*Id.* at 3-65 Cal. 295, 4 P 7(c). *Compare* Navajo Ct. Cmplt. at 40 PP 8-9 (demanding a "public apology" and a "published retraction").)

34 It appears that these plaintiffs also filed an amended complaint with the Navajo court in mid March of 2000, subsequent to the Navajo court's entry of the three orders now at issue in this lawsuit. (*See* Complaint for Damages (Modified), filed March 14, 2000, in *Donna Singer, et al. v San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District) ("Navajo Ct. Cmplt. (Modified)"), available in Pertinent Parts Navajo Ct. R. ("Complaint Modified" Tab), and as Exhibit "B" to San Juan Health District Defendants' Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497).) The amended pleading sought to incorporate their "supplemental claims" augmenting the plaintiffs' original causes of action, and to join Truck Insurance and Mr. Ickes as defendants. (*Id.* at 3-4 P 16a, 36-41 PP 341-445, 44-45 (prayer for relief).)

35 The Amended Complaint, drafted and submitted one month after the court of appeals issued its October 1, 2002 opinion, nevertheless included Truck Insurance and Mr. Ickes in the caption and makes several references to them in the body of the pleading, and still

seeks enforcement of all four orders. (*See* Amended Complaint at 98, 114, 116-119, 120.) Apparently these references persist on the theory that "while Truck Insurance and Mr. Ickes were dismissed, they were not dismissed with prejudice and then only upon the facts as found of the District Court." (*Id.* at 98.)

By affirmance, the dismissal of Truck Insurance and Ickes became the judgment of the court of appeals, and the "law of the case" as far as this court is concerned. *See* 18 James Wm. Moore, et al., *Moore's Federal Practice* P 0.404[1] at II-2 – II-3 (2d ed. rev. 1996) ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand." (emphasis in original; footnote omitted)). Therefore, that judgment is not subject to further adjudication in this court, and further consideration of the dismissal of Truck Insurance and Ickes falls beyond the scope of the remand to this court under the Tenth Circuit's mandate. (*See* Judgment, dated October 7, 2002 (certified copy of mandate received from the court of appeals November 20, 2002) (dkt. no. 460).) *See also Carpenter v. Robin & Haas Co.*, 9 F.R.D. 535, 536-537 (D. Del. 1950) ("The Court of Appeals having affirmed this court without qualification, it becomes the duty of this court upon receipt of the mandate to proceed with the execution of the judgment and no more. No power exists, under Rule 60(b) or otherwise, to alter or amend a decision of the reviewing court. *Home Indemnity Co. of New York v. O'Brien Co.*, 112 F.2d 307 [5th Cir.], *affirmed*, 180 F.2d 759 (5th Cir. 1950), *cert. denied*, 340 U.S. 851, 71 S. Ct. 80, 95 L. Ed. 617 (1950).

According to the Tenth Circuit, an "important corollary" to the law of the case doctrine "leaves to the

'mandate rule,' provides that a district court 'must comply strictly with the mandate rendered by the reviewing court.'" *Ute Indian Tribe v. State of Utah, 114 F.3d 1513, 1520-21 (10th Cir. 1997)* (quoting *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 962 F.2d 1528, 1534 (10th Cir. 1992)), cert. denied, 522 U.S. 1107, 118 S. Ct. 1034, 140 L. Ed. 2d 101 (1998)*. Strict compliance with the mandate rule in this case requires this court to give effect to the dismissal of Truck Insurance and Ickes. *See Invention Submission Corp. v. Dudas, 413 F.3d 411, 414-415 (4th Cir. 2005)* ("once a case has been decided on appeal and a mandate issued, the lower court may not deviate from that mandate but is required to give full effect to its execution. . . . Because our order stated that the district court lacked jurisdiction, the court was not free to do anything else but to dismiss the case."); *Kerman v. City of New York, 374 F.3d 93, 109-110 (2d Cir. 2004)* ("Where the appellate court has decided a question of law, the lower court on remand lacks discretion to decide that question to the contrary."); 18B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4478.3 (2d ed. 2002).

36 In addition to preliminary injunctive relief, the Order required the defendants to issue full payment of attorney's fees, costs and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court[,] but did not make any determination as to the amount of that award. (December 28, 1999 Order at [21].)

37 The December 28, 1999 Order also noted that Mr. Dickson had attested to "the highly racially inflammatory and insensitive comment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with "dog tags[.]" (*Id.* at [9].)

38 While Ms. Singer had been working as the manager of the Montezuma Creek Clinic at the time of her termination, the December 28, 1999 Order directed that "Ms. Singer be returned to her role and position as a technician" for the Health District. (*Id.* at [21].)

39 For their part, the plaintiffs were ordered to "report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court[.]" (*Id.* at [22].)

40 *Rule 65(d)* of the Navajo Rules of Civil Procedure provides that "any evidence received upon a petition for preliminary injunction, which would be admissible upon the trial on the merits, becomes part of the record at trial and need not be repeated at trial."

41 The court recounted several "examples" of "the evidence and testimony before the Court" offered during the preliminary injunction hearings, which "was overwhelmingly in favor of the plaintiffs." (*Id.* at 6, 7-8; *see, e.g., id.* at 8 ("For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs . . . is only something this Court would prefer to hear the evidence on only one time . . . in its life time.").)

42 (*See also id.* at 10 ("And accordingly the Court cites to [the] tribal code and Montana and Strate, to further its finding of jurisdiction.").)

43 As the court of appeals explained:

> In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in "repeated misrepresentations of fact and law," had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. . . . In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them "to a trial by tabloid." . . .

309 F.3d at 1219 (record citations omitted).

44 The plaintiffs' "Supplemental Pleadings" listed "the endangerment of Navajo patients at Montezuma Creek Clinic as an addition to their claims," (Navajo Ct. Supp. Pldg. at 2), but without pleading any additional factual allegations. Instead, plaintiffs submit, "The assertions are based upon the Court's Findings of Fact in the Court's Preliminary Injunction Order issued on the 28th Day of December, 1999," (*id.*), in effect conforming their own pleadings to the court's already more expansive view of the case as reflected in its December 28, 1999 Order.

45 The legal basis for summarily granting the plaintiffs what amounted to a "superpriority" judgment

lien at the expense of the defendants' existing secured creditors remains a mystery.

46 This "how much" question would seem to be one requiring findings based upon context-specific evidence. As the Navajo Supreme Court had ruled a few weeks prior to the entry of the March 1st and March 6th orders,

> The Navajo Nation Bar Association is separate and distinct from the other bars in this region. We have our own admission standards to practice law, our own standards to regulate the practice of law, and our legal economy is separate and distinct. The proper frame of reference to calculate attorney's fees is the hourly rates in the given area where the dispute arose, which here is the Tuba City judicial district. The proper standard is the fee rates of lawyers who practice there.

Managoats v. Cameron Trading Post, No. SC-CV-50-98 (Navajo 01/14/2000), at P [62], *available at* http://www.tribal institute.org/opinions/2000.NANN.0000003.htm. *Managoats* reversed the Navajo Labor Commission's award of attorney's fees using "regional attorney fee hourly rates rather than Navajo Nation rates." *(Id.)*

47 According to the plaintiffs, "In January, 2000, Mr Dickson's and Mrs. Singers' amount of back pay was given to [UHEU, Truck/Farmer's Insurance and others to pay." (Complaint (Verified), filed July 25, 2000 (dkt no. 1), at 100 P 326), but plaintiffs did not plead what that amount was, or whether such an amount was furnished as to Mr. Riggs, to anyone. (See Amended

Complaint at 98-120.) One or more affidavits or "bills" containing at least estimated figures may have been presented to the Navajo court, but if so, that court made no reference to them in its orders. (*See* Tr. 2/24/2003, at 7:23-8:5 (Ms. Rose); *id.* at 17:20-19:4 (Ms. Cox); *id.* at 20:23-21:1 (Mr. Trentadue).)

48 *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 Or. L. Rev. 1109 (2004).*

49 The Court recently elaborated upon the plenary power of Congress in Indian affairs:

> First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive." *E.g., Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U. S. 463, 470-471, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); Negonsott v. Samuels, 507 U. S. 99, 103, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993);* see *Wheeler, 435 U. S., at 323;* see also W. Canby, American Indian Law [in a Nutshell] 2 (3d ed. 1998) (hereinafter Canby) ("The independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes").
>
> This Court has traditionally identified the Indian *Commerce Clause*, U. S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power. *E.g., Morton v. Mancari, 417 U. S. 535, 552, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); McClanahan v. Arizona Tax Comm'n, 411 U. S. 164, 172, n. 7, 93 S. Ct. 1257, 36 L. Ed. 2d*

129 (1973); see also Canby 11-12; F. Cohen, Handbook of Federal Indian Law 209-210 (1982 ed.) (hereinafter Cohen) (also mentioning, *inter alia*, the *Property Clause*). The "central function of the Indian *Commerce Clause*," we have said, "is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico, 490 U. S. 163, 192, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989)*; see also, *e.g., Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M., 458 U. S. 832, 837, 102 S. Ct. 3394, 73 L. Ed. 2d 1174 (1982)* ("broad power" under the Indian *Commerce Clause*); *White Mountain Apache Tribe v. Bracker, 448 U. S. 136, 142, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)* (same, and citing *Wheeler, supra, at 322-323*).

The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, "to make Treaties." *U. S. Const., Art. II, § 2, cl. 2.* But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with "matters" with which otherwise "Congress could not deal." *Missouri v. Holland, 252 U. S. 416, 433, 40 S. Ct. 382, 64 L. Ed. 641, 18 Ohio L. Rep. 61 (1920)*; see also L. Henkin, Foreign Affairs and the U. S. Constitution 72 (2d ed. 1996). And for much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes. See, *e.g.*, Cohen 109-111; F. Prucha, American Indian Policy in the Formative Years 44-49 (1962).

United States v. Lara, 541 U.S. 193, 200-201, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004). Further, to the extent that "'Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law,' Cohen 208," *Lara* would ground Congress' authority "not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.' *United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 315-322, 57 S. Ct. 216, 81 L. Ed. 255 (1936)*; . . . ." *Id. at 201* (additional citations omitted).

Moreover, "Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority." *Id. at 202.*

50 *United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)* (quoting *United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)* (internal quotation omitted) (citing *Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515, 557, 8 L. Ed. 483 (1832)*); *accord Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001)*; *United States v. Lara, 541 U.S. 193, 204, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).*

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51 *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)* (quoting *Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515, 559, 8 L. Ed. 483 (1832)*).

52 *United States v. Mazurie, 419 U.S. at 557* (quoting *United States v. Kagama, 118 U.S. 375, 381-82, 6 S. Ct. 1109, 30 L. Ed. 228 (1886)*, and *McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973)*); *see also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16, 8 L. Ed. 25 (1831)* (describing Cherokee Nation as "a distinct political society, separated from others, capable of managing its own affairs and governing itself").

53 Indeed, some years ago, the court of appeals explained it this way: "Indian tribes are not states. *They have a status higher than that of states.* They are subordinate and dependent nations possessed of all powers as such," and are limited as to those powers "only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States." *Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959)* (emphasis added). As the *MacArthur* panel explained, "tribes are not subordinate to the states, *see Washington v. Confederated Tribes, 447 U.S. 134, 154, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)*, and certainly not to counties." *309 F.3d at 1222* (footnote omitted).

54 *Cf.* Skibine, *Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms, 24 N.M.L. Rev. 191, 191-192 (1994)*:

> If the Court asks whether Indian tribes have sovereign rights because these rights, which have always existed, have never been relinquished in a treaty or taken away by an act of Congress, the Court is asking a legal question, the answer to

which depends on statutory construction and historical interpretation. If, however, the Court asks whether a tribe's sovereign rights still exist because they are vital to tribal self-government, it is asking a question of a more political and subjective nature. In effect, the answer to this second question will largely depend on who decides the issue.

55 *See, e.g., Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)* ("The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power."); *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137, 142, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)* ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."); *Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985)* (affirming Navajo Nation's power to impose possessory interest and business activity taxes without prior approval of Interior Department); *Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996)* (tribal taxing power extends to trust allotment lands).

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56 *See, e.g., White Mountain Apache Tribe v. Bracker, 448 U. S. 136, 151, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Montana v. United States, 450 U.S. at 557; Merrion, 455 U.S. at 137; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)* (tribe's authority to regulate hunting and fishing by non-members on tribal lands preempted state jurisdiction); *cf. Brendale v. Confederated Tribes*

and Bands of the Yakima Nation, 492 U.S. 408, 438-444, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (Stevens & O'Connor, JJ.); *id.* at 448-468 (Blackmun, Brennan & Marshall, JJ.) (1989).

57 *See Merrion, 455 U.S. at 137* (referring to "the tribe's general authority as sovereign, to control economic activity within its jurisdiction"); *Duro v. Reina, 495 U.S. at 688* (noting that zoning is "vital to the maintenance of tribal integrity and self-determination"); *see also Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. at 152-153* ("Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest") (citing *23 Op. Atty. Gen. 214 (1900)*; *17 Op. Atty. Gen. 134 (1881)*; *7 Op. Atty. Gen. 174 (1855)*; *Powers of Indian Tribes, 55 I. D. 14, 46 (1934)*)).

58 In their memorandum, the Health District defendants quotes *Strate*'s reiteration of the *Montana* examples, highlighting all four examples in boldface type as the preface for their argument that "plaintiffs' claims have absolutely nothing to do with internal tribal self-government, but rather address their own treatment as individuals and the alleged treatment of certain patients . . . ." (San Juan Health District Defendants' Memorandum Regarding Subject Matter Jurisdiction and in Support of Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 497), at 13.)

59 Cohen's *Handbook* observed that at least as of 1942, "The legal powers of an Indian tribe, measured by the decisions of the highest courts, are far more extensive than the powers which most Indian tribes have been actually permitted by energetic officials to exercise in their own right"; but the *Handbook* also anticipated that "affording statutory recognition of these powers of tribal self-government and administrative assistance in developing adequate mechanisms for such government" through the Wheeler-Howard Act (Indian Reorganization Act) of 1934 "may reasonably be expected to end the conditions that have in the past led the Interior Department and various state agencies to deal with matters that are properly within the legal competence of the Indian tribes themselves." *Handbook* (1942 ed.) at 125, 126 (footnote omitted).

It follows that the true scope and extent of inherent tribal sovereignty cannot fairly be measured by "historic practices" or "the experience of forerunners of modern tribal courts" during the era of enforced tribal dormancy to which the *Handbook* referred. *Lara, 541 U.S. at 206* (discussing *Duro v. Reina, 495 U.S. at 689-692.*) If, as the *Lara* Court postulates, "major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty," *id. at 202*, then Indian tribes reasonably should anticipate a more expansive reading of those same "metes and bounds" by the Court, given the fact that the "political branches" of "the Federal Government are firmly committed to the goal of promoting tribal self-government," *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-335, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)*, and have been consistently pursuing that goal for more than 35 years. *See id. at 335-336.*

60 Pub. L. No. 101-549, § 107(d), 104 Stat. 2399 at 2464 (1990), *codified at 42 U.S.C.A. § 7601(d)(1)(A) (2003).*

61 Pub. L. No. 100-581, § 207, 102 Stat. 2938 at 2940 (1988), *codified as amended at 33 U.S.C.A. § 1377(e)(2001).*
[**106]
62 Pub. L. No. 99-339, § 302(c), 100 Stat. 642 at 666 (1986), *codified at 42 U.S.C.A. § 300h-1(e)(2003).*

63 "So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. . . . Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." *Id.*

64 In 1970, "there were only 85 operating tribal courts." Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 289 (2005). By 1976, "there were 117 operative tribal courts in Indian country," and "tribal justice systems" were seen as "evolving institutions that are capable of fair and efficient justice." 1 American Indian Policy Review Comm'n, *Final Report* 163, 167-168 (1977). "Today, approximately 275 tribal courts and 23 CFR courts exist in the United States," but "the numbers . . . tell only part of the story of the growth and diversity of these unique and evolving institutions that are in the forefront of modern tribal efforts to define the meanings and scope of tribal sovereignty . . . ." David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 420 (5th ed. 2005).

Much has changed in thirty-five years. Most of the 562 federally recognized tribes have created courts under their own constitutions or laws. This requires considerable infrastructure. Tribal justice systems need courtrooms and office spaces, judges for both trials and appeals, prosecutors, court clerks, tribal defenders in criminal cases, counselors, child welfare workers, and jail facilities. In addition to personnel, tribal justice systems must have civil and criminal laws, rules of court procedure, law libraries, and, typically, intergovernmental agreements with federal and state agencies for child welfare, environmental regulation, and criminal law. . . .

Wilkinson, *Blood Struggle*, at 289. "Tribal court systems vary from the highly structured, multiple court system of the Navajo Nation, served by tribal prosecutors and defense advocates, to very informal single-judge courts operated on a part-time basis without supplementary services." Canby, *American Indian Law*, at 67.

65 Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms*, 24 *N.M. L. Rev. 191, 191 (1994).*

66 *See also* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955 (1972); R. Ericson & D. Snow, Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445 (1970).

67 Congress continues to encourage greater tribal participation in and responsibility for the administration of federal services to Indians. *See, e.g.*, Tribal Self-Governance Act of 1994, Pub. L. 103-413, title II, 108 Stat. 4250 at 4270 (1994)(*codified at 25 U.S.C. §§ 458aa-458hh (2000)*).

68 The *New Mexico* case was before the Court in the October 1982 Term on certiorari after remand to the Tenth Circuit for remand "in light of *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981),*" decided during the prior Term. *462 U.S. at 330.* On remand, the Tenth Circuit had "adhered to its earlier decision" affirming injunctive relief against the enforcement of state hunting and fishing laws "against any person for hunting and fishing activities conducted on the reservation," a decision which in turn was affirmed by a unanimous Court. *Id.*

69 Pub. L. No. 103-413, Title II, 108 Stat. 4270 (1994), *codified at 25 U.S.C.A. §§ 450 note, 458aa-458hh (2001).*

70 Pub. L. No. 106-447, 114 Stat. 1934 (2000), *codified at 25 U.S.C. § 4301 note (2001).*

71 *25 U.S.C.A. § 1911(d)* reads:

> **(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.**
>
> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to

Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

72 *25 U.S.C.A. § 1301(2)* now reads:

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians; . . .

Pub. L. No. 102-137, 105 Stat. 646 (1991) repealed a time limitation on the 1990 amendments to *§ 1301. See generally,* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767 (1993).*

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73 And the statute's legislative history confirms that such was Congress' intent. See, *e.g.*, H. R. Conf. Rep. No. 102-261, pp. 3-4 (1991) ("The Committee of the Conference notes that . . . this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations"); accord, H. R. Rep. No. 102-61, p. 7 (1991); see also S. Rep. No. 102-168, p. 4 (1991) ("recognizing and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); 137 Cong. Rec. 9446 (1991) (statement of Sen. Inouye) (the "premise [of

the legislation] is that the Congress affirms the inherent jurisdiction of tribal governments over nonmember Indians" (emphasis added)); *id.*, at 10712-10714 (statement of Rep. Miller, House manager of the bill) (the statute "is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away" and the bill "recognizes an inherent tribal right which always existed"); *id.*, at 10713 (statement of Rep. Richardson, a sponsor of the amendment) (the legislation "reaffirms" tribes' power).

Lara, 541 U.S. at 199.
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74 *Lara* explained that "in *Duro*, the Court drew upon a host of different sources in order to reach its conclusion that a tribe does not possess the inherent power to prosecute a non-member. The Court referred to historic practices, the views of experts, the experience of forerunners of modern tribal courts, and the published opinions of the Solicitor of the Department of the Interior. *495 U.S., at 689-692*," *541 U.S. at 206*, which largely reflected the impact of earlier federal Indian policies. *Cf. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855-856, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985)* ("The existence and extent of a tribal court's jurisdiction will require a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.").

75 Of course, in his Message from the President of the United States Transmitting Recommendations for Indian Policy, dated July 8, 1970, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (1970), President Richard M. Nixon had soundly repudiated the destructive forced

"termination" policy that briefly held sway in the Congress during the 1950s, proclaiming the Indians' right to self-determination and urging Congress to make tribal self-determination a matter of national policy. "In many respects it was a logical culmination of all that had occurred and all that had been recommended in Indian affairs during the preceding decade. But in the full context of Indian-white relations in the United States," wrote historian Alvin M. Josephy, "it was historic in tone and intent. . . . It showed that a national administration had at last listened to the Indians and accepted *their* ideas of what they needed and wanted," and "it pointed federal policy in a new direction and demanded new thinking and attitudes from those in the federal agencies who dealt in Indian affairs." Alvin M. Josephy, *Red Power: The American Indians' Fight for Freedom* 223 (1971) (emphasis in original).

> The ideas in Nixon's text were not new, but the widely cited message, with its remarkable force and specificity, served as a catalyst. Several of the proposals were adopted by Congress, in a form surprisingly close to Nixon's guidelines. . . .
>
> The principal legislative initiative to emerge from the Nixon proposals, the Indian Self-Determination and Education Assistance Act of 1975, *25 U.S.C.A. §§ 450a-450n* gives express authority to the Secretaries of the Interior and Health and Human Services to contract with, and make grants to, Indian tribes and other Indian organizations for the delivery of federal services. The Act reflects a fundamental philosophical change concerning the administration of Indian

affairs: tribal programs are funded by the federal government, but the programs should be planned and administered by the tribes themselves; federal "domination" should end. . . .

David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 220 (5th ed. 2005). *See also* Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 Tex. L. Rev. 1195 (1978).

The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975), in turn, has particular relevance to this case: as noted above, plaintiffs Singer, Riggs and Dickson are currently employed by Utah Navajo Health Systems, Inc., a Native American non-profit organization that has operated the Montezuma Creek Clinic under a "Pub. L. 93-638 contract" with the Navajo Nation since January 1, 2000--when it replaced the SJHSD, which had managed the clinic for several years under a prior contract with the Indian Health Service.

76 Congress enacted the Indian Tribal Justice Act based upon its findings that

(1) there is a government-to-government relationship between the United States and each Indian tribe;

(2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;

(3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;

(4) Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems;

(5) tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;

(6) Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;

(7) traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;

(8) tribal justice systems are inadequately funded, and the lack of adequate funding impairs their operation; and

(9) tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

25 U.S.C.A. § 2601(1)-(9)(2001).

77 *See, e.g., 25 U.S.C.A. § 3631 (2001); 25 U.S.C.A. § 3665 (2001).*

78 Pub. L. No. 95-608, 92 Stat. 3069 (1978), *codified at 25 U.S.C.A. §§ 1901 et. seq. (2001).*

79 Of course, the analytical approach the Court has prescribed to define the limits of tribal civil jurisdiction over nonmembers requires case-by-case determination of the reach of tribes' inherent sovereignty, which in turn requires frequent recourse to the courts.

80 *Oliphant* deemed tribal jurisdiction over non-Indian offenders to be a function of Indian tribes' "external sovereignty" that had been diminished through their submission to the "overriding sovereignty" of the United States:

> Indian reservations are "a part of the territory of the United States." *United States v. Rogers, 45 U.S. 567, 4 How. 567, 571, 11 L. Ed. 1105 (1846).* Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." *Id., at 572.* Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "Their rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson v. M'Intosh, 21 U.S. 543, 8 Wheat. 543, 574, 5 L. Ed. 681 (1823).*

Id. at 208-209.

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81 The *Oliphant* Court "rested its conclusion about inherent tribal authority . . . in large part upon [this]

'commonly shared presumption,'" and based "its descriptions of inherent tribal authority" in *Oliphant* and other cases "upon the sources as they existed at the time the Court issued its decisions." *Lara, 541 U.S. at 205, 206. Oliphant*'s reliance on that presumption and treatment of those sources--indeed, its whole approach to the issue--has been the subject of vigorous on-going scholarly criticism. *See, e.g.,* Russel L. Barsh & James Y. Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark,* 63 Minn. L. Rev. 609 (1979); Peter C. Maxfield, Oliphant v. Suquamish Indian Tribe: *The Whole is Greater than the Sum of the Parts, 19 J. Contemp. L. 391, 399-439 (1993)* (a source-by-source critique); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Cal. L. Rev. 1137, 1161-1163 (1990);* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1 (1999);* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes,* 34 Ariz. St. L.J. 113 (2002); Symposium, *13 Kan. J. L. & Pub. Pol'y 59 (2003); see also* Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to* Oliphant, 9 Am. Indian L. Rev. 51 (1981); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country,* 19 Am. Indian L. Rev. 353 (1994).

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82 In what could almost be read as a rebuttal to the American Indian Policy Review Commission's jurisdictional analysis, the Court continued:

> We recognize that some Indian tribal court systems have become increasingly sophisticated

and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.

435 U.S. at 212-213 (footnote omitted).

The *Oliphant* Court's suggestion that the exercise of tribal criminal jurisdiction over non-Indians poses a fundamental conflict with the individual rights of Americans guaranteed by national citizenship echoed the dissenting views of Judge--now Justice--Anthony M. Kennedy in *Oliphant* at the court of appeals level. *Compare Oliphant v. Schlie, 544 F.2d at 1014-1019* (Kennedy, J., dissenting) *with United States v. Lara, 541 U.S. at 211-214* (Kennedy, J., concurring in judgment).

83 *National Farmers Union* seemed to signal a retreat from the Court's assertion four years earlier in *Montana v. United States* that "though *Oliphant* only

determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana, 450 U.S. at 565.* "Rather than further extending the rule in *Oliphant* to tribal jurisdiction over civil matters, the Supreme Court concluded:

> The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1501 (10th Cir. 1997), cert. denied, 522 U.S. 1090, 118 S. Ct. 880, 139 L. Ed. 2d 868 (1998) (quoting *National Farmers, 471 U.S. at 855-56*).

The *National Farmers* opinion was authored by Justice Stevens, writing for a unanimous Court. Three years before, in *Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982)*, Justice Stevens had quoted the above passage from *Montana*, this time in his dissenting opinion, joined by Chief Justice Burger and Justice Rehnquist, objecting to the imposition of a tribal severance tax on existing non-Indian lessees of tribal mineral resources. By the time of *National Farmers*, Justice Stevens had acceded to the view that "the reasoning of *Oliphant* does not apply" to the question whether a tribal court had civil

jurisdiction over a lawsuit involving both tribal members and non-Indians that arose within reservation boundaries.

Subsequently, the Court declared that *National Farmers* and *Iowa Mutual* "do not expand or stand apart from *Montana*'s instruction on 'the inherent sovereign powers of an Indian tribe.' *450 U.S., at 565.*"

While *Montana* immediately involved regulatory authority, the Court broadly addressed the concept of "inherent sovereignty." *Id., at 563.* Regarding activity on non-Indian fee land within a reservation, *Montana* delineated--in a main rule and exceptions--the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non Indians." *Id., at 565.* As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non Indian fee lands generally "do[es] not extend to the activities of nonmembers of the tribe." *Ibid.*

Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

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84 Both *Kennerly* and *Williams* involved state court lawsuits by non-Indian creditors against tribal members residing on the reservation arising out of purchases transacted within reservation boundaries. In

both cases, the Court held that the state courts lacked jurisdiction over those claims. "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. . . ." *Williams, 358 U.S. at 223.*

85 The Court quoted from the 1982 edition of Cohen's *Handbook* on this point:

> A leading treatise on Indian law suggests strongly that Congress has had a similar understanding:
>
> "In the civil field, however, Congress has never enacted general legislation to supply a federal or state forum for disputes between Indians and non-Indians in Indian country. Furthermore, although treaties between the federal government and Indian tribes sometimes required tribes to surrender non-Indian criminal offenders to state or federal authorities, Indian treaties did not contain provision for tribal relinquishment of civil jurisdiction over non-Indians.". . .

471 U.S. at 855 n.17 (quoting *Handbook* (1982 ed.) at 253-254).

87 In his concurring opinion, Justice Souter, joined by Justice Kennedy and Thomas, wrote that "if we are to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians, the

source of doctrine must be *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)*, and it is in light of that case that I join the Court's opinion." *532 U.S. at 659* (Souter, Kennedy & Thomas, JJ., concurring).

88 In *Atkinson*, the Court held that the Navajo Nation had "failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner" under *Montana*'s first exception, or that the tax "is necessary to vindicate the Navajo Nation's political integrity" under *Montana*'s second exception, which "grants nothing "'beyond what is necessary to protect tribal self-government or to control internal relations."'" *532 U.S. at 658-659* (quoting *Strate, 520 U.S. at 459* (quoting *Montana, 450 U.S. at 564*)). *Atkinson* also cited Justice White's opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 431, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989)*, for the proposition that under *Montana*'s second exception, "the impact of the nonmember's conduct 'must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.'" *532 U.S. at 659*.

89 "*Montana* delineated--in *a main rule and exceptions*--the bounds of the power tribes retain to exercise 'forms of civil jurisdiction over non-Indians.' *Id. at 565*." *Strate, 520 U.S. at 453* (emphasis added).

90 This court has not yet grown so cynical as to infer that the *Montana* analysis was concocted merely as a device to be used to diminish Indian tribal sovereignty "one case at a time," though some argue quite convincingly that such has been its actual effect,

intended or not. *See, e.g.*, Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty, 50 Am. U. L. Rev. 1177 (2001)*; Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 37 (1999)*; *cf. Nevada v. Hicks, 533 U.S. at 360* (opinion by Scalia, J.) ("with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land"); *Wilson v. Marchington, 127 F.3d 805 (9th Cir.1997)*; *Ford v. Todecheene, 394 F.3d 1170 (9th Cir. 2005)* (tribal courts lack jurisdiction to apply tribal tort law to non-Indians causing injury or death to tribal members).

91 *Available at* http://www.tribal-institute.org/opinions/1990.NANN.0000009.htm. *Cf. Strate, 520 U.S. at 453* ("the *Iowa Mutual* statement . . . stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' *480 U.S., at 18.*").

92 "As to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction . . . ." *Strate, 520 U.S. at 453.*

93 "If this power is to be taken away from them, it is for Congress to do it." *Williams v. Lee, 358 U.S. at 223* (citing *Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 47 L. Ed. 299 (1903)).*
[**150]

94 Plaintiffs read the current congressional and Executive policies as creating a presumption favoring tribal jurisdiction over non-Indians, and argue that "this Court can enforce the Orders based upon *Montana* that presumes against the Tribal Court jurisdiction, or it can enforce the Orders based upon Congress' presumption for Tribal Court jurisdiction, but it can't do both." ("Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492), at 5; *see also* "Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction" [unsigned original document submitted by plaintiffs' counsel], filed February 24, 2003 (dkt. no. 502), at 10-17.)

95 The earlier Treaty with the Navajo, dated September 9, 1849, 9 Stat. 974, 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 583-584 (1904), acknowledged that the "tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain under the aforesaid protection and jurisdiction," consistent with the 1848 Treaty of Guadalupe Hidalgo, but did not address Navajo territory or jurisdiction, other than to annex their territory to New Mexico, guarantee Americans "free and safe passage" through Navajo country, and promise federal punishment of citizens committing crimes against Navajos and that "the Government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries . . . ." *Id.*, arts. I, II, III, VI, VII, IX, 1 Kappler at 583-584.

Copies of the Navajo Treaties of 1849 and 1868, as well as the Treaty of Guadalupe Hidalgo are included as

Exhibits D, E & C, respectively, in Pltfs' 12/19/03 Compendium A/B.

96 We have had occasion in the past to describe the circumstances under which the agreement was reached. "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country." *Williams v. Lee, 358 U.S. at 221.*"

Id. at 174.

97 *Available at* http://www.tribal-institute.org/opinions/1999.NANN.0000013.htm.

98 *Available at* http://www.tribal-institute.org/opinions/1990.NANN.0000003.htm.

99 *Available at* http://www.tribal-institute.org/opinions/1983.NANN.0000042.htm.

100 *Available at* http://www.tribal-institute.org/opinions/1988.NANN.0000012.htm.

101 According to *Tiller's Guide:*

> The Navajo Nation, comprised of 26,606 square miles, is the largest Indian reservation in the United States, both in terms of land base and

tribal enrollment. The land base, comparable in size to the state of West Virginia, is located in northeast Arizona, northwest New Mexico, and southeast Utah. . . .

The original Navajo Reservation, established pursuant to a treaty concluded on June 1, 1868, and ratified by Congress on July 25, 1868, contained 3,414,528 acres, only about 10 percent of the land the Navajos earlier owned and used. The original reservation was expanded by Executive Orders in 1878, 1880, 1882, 1884, 1900, 1901, 1905, 1907, and 1908. In 1911, lands in New Mexico were restored to the public domain. Minor revisions to the Navajo Reservation's size were made in 1912, 1913, 1914, 1915, and 1917. Executive Orders in 1917 and 1918 again expanded the reservation, In 1930 and 1931, the reservation was expanded by Congressional Acts. In 1933, Congress added 552,000 acres in Utah to the reservation, and in 1934 provided for some smaller additions. Minor changes to the size of the reservation in 1948, 1949 and 1958. Court decisions in 1962, 1963, and 1977 reallocated some areas of the Navajo Reservation to the Hopis.

In addition to the main Navajo Reservation, there are three satellite areas of Navajo land located in New Mexico. The Canoncito Reservation, the present boundaries of which were established in 1960, contains 57,863 acres of trust land. The Alamo Reservation, established in 1964, contains 62,000 acres. The Ramah Reservation, established in 1931, contains 91,456 acres. Today, the total acreage of the Navajo Reservation, including the main reservation, trust

lands of the Eastern Navajo, and the satellite lands of Canoncito, Alamo and Ramah, is 16,224,896 acres.

Veronica E. Velarde Tiller, ed., *Tiller's Guide to Indian Country* 326 (2d ed. 2005).

102 [**165] This case arises from that portion of the Navajo reservation that was added by Congress in 1933, within which the Montezuma Creek Clinic is located. *See* Act of March 1, 1933, ch. 160, 47 Stat. 1418, as amended by the Act of June 14, 1934, ch. 521, 48 Stat. 960, and Pub. L 90-306, 82 Stat. 121 (1968); *Pelt v. State of Utah, 104 F.3d 1534, 1540 (10th Cir. 1996).* (Memorandum in Support of Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment, filed February 28, 2003 (dkt. no. 504), at 4 n. 1).

103 It appears that the land in question is located at Montezuma Creek Subdivision # 1, parcels 23 and 24, section 32, T. 40 S., R. 24E, Salt Lake Meridian, Utah. (*See* "Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, [**166] in *Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV (Navajo Nation District Court, Shiprock District), at 31 P 18, *available in* Pertinent Parts Navajo Ct. R. ("Complaint for Damages" Tab).)

104 "The New Deal for the American Indians began before the passage of the Indian Reorganization Act. . . . Soon after his appointment, Secretary Ickes issued an order that ended the sale of allotments and the issuance

of fee patents." Floyd A. O'Neil, "The Indian New Deal: An Overview," in *Indian Self-Rule* 30, 39 (Kenneth R. Philp., ed. 1986); *see 54 I.D. 559 (1934)*. In his first annual Report in 1933, Commissioner of Indian Affairs John Collier observed:

> The allotment system has enormously cut down the Indian landholdings and has rendered many areas, still owned by Indians, practically unavailable for Indian use. The system must be revised both as a matter of law and of practical effect. Allotted lands must be consolidated into tribal or corporate ownership with individual tenure, and new lands must be acquired for the 90,000 Indians who are landless at the present time. . . .

Report of Comm. of Ind. Aff., *in* Ann. Rept. of Sec'y of Interior, 1933, at 68, *quoted in Handbook* (1942 ed.) at 27.

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105 Speaking of a similar 1934 enlargement of the Navajo Reservation in Arizona that encompassed the non-Indian fee land of the Cameron Trading Post, the *Atkinson* Court remarked that the enlargement "did not alter the status of the property: It is, like millions of acres throughout the United States, non-Indian fee land within a tribal reservation." *532 U.S. at 648* (citing Act of June 14, 1934, ch. 521, 48 Stat. 960-962). But remembering that most of those "millions of acres" were alienated through various Allotment acts rather than being added through enlargement of reservation boundaries in aid of tribal self-government--or by being purchased using Indian trust funds-- the lands in

question at Montezuma Creek are not "like" those "millions of acres" at all.

Viewed through the lens of the relevant Indian policy of the political branches in 1934, the *Atkinson* Court may have erred by importing *Montana*'s "general principle" into the context of the Navajo Nation without examining the historical relevance of *Montana*'s rationale. *See* Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 719 (4th ed. 2003) (text note re: "*Atkinson*'s Use of *Montana*").

106 *Montana* and its progeny address *inherent* tribal authority over nonmembers, *see Atkinson, 532 U.S. at 649-650*, while the Navajo courts look to treaty and statutory sources of jurisdiction as well: "Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation's treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation." *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo S. Ct. 01/14/2000), at P [40].

107 According to the Part II Plaintiffs, "The Navajo Nation District Court Division of Shiprock, lies within the exterior borders of New Mexico, is organized by Navajo legislative authority *as found in federal statutes 25 U.S.C. §§ 461-479 pursuant to federal authority found in Article I of the United States Constitution* for communicating and working with Indian tribes." (Amended Complaint at 110 (emphasis added).)

This is not accurate.

As *Tiller's Guide* correctly recounts, the government of the Navajo Nation was *not* organized under the Wheeler-Howard Act, or Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, *codified at 25 U.S.C.A. §§ 461-479 (2001)*, and does not exercise its powers of self-government under an "IRA" constitution, *see 25 U.S.C. § 476*, in contrast to many other Indian tribes, bands and communities that have adopted IRA constitutions.

Indeed, this appears to a point of some pride:

> Poorly-worded and restrictive tribal codes forced upon various tribes by the Bureau of Indian Affairs we thankfully do not have, since the Navajo Nation is not organized under the Indian Reorganization Act. See, American Indian Lawyer Training Program, Manual of Indian Law, E-4 (1976 Ed.). Since the Navajo rely upon their inherent sovereignty and not the restrictions placed upon other Indian Nations, we are able to solve problems on our own as they arise.

Deal v. Blatchford, 3 Navajo Rptr. 159, at P [29] (Navajo Ct. App. 1982), *available at* http://www.tribalresourcecenter.org/opinions/opfolder/1982.NANN.0000026.htm.

108 Res. of the Navajo Tribal Council, CO-63-67 (Oct. 9, 1967), *codified at* Navajo Nation Code, tit. 1, §§ 1-9 (1995).

109 Navajo Nation Council Resolution No. CD-94-85 (December 4, 1985), *codified at* Navajo Nation Code, tit.

7, §§ 101 *et seq.* (1995). In a recent opinion, the Navajo Supreme Court explained:

> The Navajo Nation government is comprised of three co-equal branches, each with its own area of responsibility and limitations of power. The Judicial Branch was originally created as a separate branch in 1959. Navajo Tribal Council Resolution Nos. CO-69-58, Sec. 1 (October 16, 1958) and CJA-5-59, Sec. 1 (January 9, 1959) (effective April 1, 1959 and codified at Title 7 of the Navajo Nation Code). It was later reestablished as a separate branch by the Navajo Nation Judicial Reform Act of 1985. Navajo Nation Council Resolution No. CD-94-85 (December 4, 1985) (codified as Title 7 of the Navajo Nation Code). . . .

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at P [16] (Navajo 09/07/2001), *available at* http://www.tribal-institute.org/opinions/2001.NANN.0000012.htm. [**179]

110 *See* Navajo Nation Code, tit. 2, §§ 101-878, 931-978, 1001-1021 (1995). For many years,

> the Navajo Nation government operated as a two-branch government: the Legislative and Judicial Branches. Under that scheme, the Navajo Tribal Council controlled both the legislative and executive functions of government. The Chairman of the Navajo Tribal Council was the chief legislative officer as well as the chief executive officer. This unilateral control left no room for the exercise of checks and balances. This resulted in

unchecked abuses of power and eventually to what is now known as the "1989 Crisis."

From the experiences of the 1989 Crisis and in recognition of the fundamental flaw in this two-branch design, the Navajo Nation Council undertook the Title II Amendments which separated governmental powers into three separate and equal branches. "The lack of definition of power and separation of legislative and executive functions . . . also allowed the legislative body to overly involve itself in the administration of programs thereby demonstrating the need to limit the legislative function to legislation and policy decision making and further limit the executive function to implementation of laws and representation of the Navajo Nation." Preamble of Resolution No. CD-68-89, Par. 3. The Title II Amendments redistributed governmental powers among the Legislative, Executive and Judicial Branches. 2 N.N.C. 1. The Title II Amendments, along with the Navajo Nation Bill of Rights and the Judicial Reform Act of 1985, are fundamental, organic laws, which are superior to any conflicting law. See *Bennett v. Navajo Board of Election Supervisors*, 6 Nav. R. 319 (1990).

Tuba City Judicial Dist. of the Navajo Nation v. Sloan, No. SC-CV-57-97, at PP [16]-[17].

111 *Accord* Stephen Conn, *Mid-Passage--The Navajo Tribe and Its First Legal Revolution*, 6 Am. Ind. L. Rev. 329, 338-339 (1978) ("The Navajos were concerned with the establishment of a legal forum which would be

accepted by those who would challenge the tribe's ability to govern.").

112 Wilkinson, *Blood Struggle*, *supra*, at 289.

113 *Available at* http://www.tribalresourcecenter.org/opinions/opfolder/1982.NANN.0000026.htm.
[**192]

114 According to the Navajo Supreme Court, "The jurisdiction of the Navajo courts is not derived from a federal grant of power, but rather comes from the Navajo Nation's inherent sovereignty. *Navajo Tribe v Orlando Helicopter Airways, Inc.*, 1 Nav. R. 40 (1972)." *Pela v. Peabody Coal Co.*, No. A-CV-18-89 (Navajo S. Ct. 09/28/1990), at P [20], *available at* http://www.tribal-institute.org/opinions/1990.NANN.0000009.htm.

115 On this point, the Navajo Court of Appeals quoted Cohen's *Handbook:*

> "The powers of an Indian tribe in the administration of justice derive from the substantive powers of self-government which are legally recognized to fall within the domain of tribal sovereignty. If an Indian tribe has power to regulate the marriage relationships of its members, it necessarily has power to adjudicate, through tribunals established by itself, controversies involving such relationships. So, too, with other field of local government in which our analysis has shown that tribal authority endures. In all these fields the judicial powers of

the tribe are coextensive with its legislative or executive powers."

Id. at P [26] (quoting *Handbook* (1942 ed.) at 145 (footnotes omitted), and citing Margold, *Powers of Indian Tribes 55 Interior Dec. 14, 56 (Oct. 25, 1934)*).

116 *Nelson* defined "tribal land to include "both land held in trust by the United States, whether for the Navajo Nation or individual members, and land held in fee by the Navajo Nation or individual members." *Id.* at n.1 P [44].

117 "While *Hicks* applied *Montana* to a certain type of non-Indian activity on trust land, the U.S. Supreme Court explicitly restricted its holding and left open the issue of general civil authority. It stated that 'our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.' *Id.* at 358 n. 2. Therefore, according to the court, the holding 'leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general.' *Id.*" *Id.* at P [33] (footnote omitted).

[**197]

118 "See *Montana; Strate v. A-1 Contractors, 520 U.S. 438 (1997)* (right-of-way owned by State of North Dakota subject to *Montana*); *Atkinson* (fee parcel within Navajo Reservation); see also *El Paso Nat'l Gas v. Neztsosie, 526 U.S. 473, 483 n. 4, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999)* (stating that Montana test not necessary because activity occurred on trust land within *Navajo Reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983)* (same on Mescalero Apache Reservation)." *Id.*

119 *Dale Nicholson Trust v. Chavez*, No. SC-CV-69-00 (Navajo 01/06/2004), *available at* http://www.tribal-institute.org/opinions/2004.NANN.0000004.htm, carved out an exception to *Nelson*'s limitation of the application of *Montana* to non-Indian owned fee lands:

> State officials are a special category of non-Indians for jurisdictional purposes. State officials are not, however, outside Navajo courts' subject matter jurisdiction merely because they are acting as agents of a state government. *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated*, No. SC-CV-13-98 (Nav.Sup.Ct June 5, 2002) (rejecting *Eleventh Amendment* state sovereign immunity and other jurisdictional defenses based on status as state officials). In *Jones* we stated that the legal doctrine of "intergovernmental immunity" barring authority over officials of other governments no longer exists. Id., slip op. at 5-6. The district court's legal conclusion in this case was incorrect, as our courts do not lack subject matter jurisdiction over state officials merely because they are agents of a state.
>
> . . . .
>
> Though we rejected an automatic bar to jurisdiction over state officials in *Jones*, supra, we suggested such jurisdiction depends on fulfilling *Montana*, even where, as in *Jones*, the state activity is on tribal land. We authorized a remand in *Jones* to consider jurisdiction in light of *Nevada v. Hicks, 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)*, to allow the Office of Navajo

Labor Relations to establish more evidence on the two *Montana* exceptions. No. SC-CV-13-98, slip op. at 8. If *Jones* applies to this case, the Trust must affirmatively establish one of the two *Montana* exceptions against the state defendants, even if the actions of the state officials to seize the Trust's property were to have occurred on tribal land.

120 The non-Indian defendant in *Manygoats* is actually the Atkinson Trading Co., the same litigant as was before the United States Supreme Court in *Atkinson Trading Co. v. Shirley*, discussed *supra*, doing business as the "Cameron Trading Post." *Id.* at P [13]. According to *Manygoats*,

> The Trading Post is the area's major employer, and during the period from April through September, it employs approximately 130 people, 85% of whom are Navajo. The Trading Post employs approximately 80 people during the winter, and 70 to 75% of those employees are Navajos.

Id. at P [15].

121 Apparently the Atkinson company tried to evade *Montana*'s "consensual relationship" exception by arguing that Cameron Trading Post hires Navajo employees against its will. The Navajo court rejected this: "We do not buy Atkinson's assertion that the practice of hiring Navajos is involuntary, given their obvious importance to the very business of the establishment (as reflected in its website pages)." *Manygoats*, at P [45].

122 *See also Arizona Public Service Co.*, No. A-CV-08-87, at PP [102], [104], [108] (Navajo Nation retains the "police" power to protect the health, welfare and safety of its citizens," and "among the purposes of NPEA is the protection of the health, safety and welfare of Navajo workers. 15 N.T.C. § 602(a)(6).").

123 *Available at* http://www.tribal-institute.org/opinions/2003.NANN.0000016.htm.

124 Atkinson challenged the Navajo Supreme Court's *Manygoats II* ruling in federal district court on jurisdictional grounds, and that court granted summary judgment *in Atkinson's favor. Atkinson Trading Co. v. Manygoats*, Civil No. CIV 02-1556-PCT-SMM (D. Ariz., decided March 17, 2004). That court acknowledged that the Navajo Nation Labor Commission was "correct that the regulation they have attempted to impose on Atkinson (the NPEA) is directly related to Atkinson's employment of Navajo Nation members, the precise relationship at issue here." *Id.*, slip op. at 13. Yet in order to avoid upholding Navajo enforcement of the NPEA's "just cause" and prior notice requirements, the district court (1) engrafted a new element onto *Montana*'s first exception requiring the "consensual relationship" to include the nonmember's explicit or implicit consent *to tribal jurisdiction*--admittedly forsaking the plain meaning of the English language in doing so; and (2) found that "while employment matters concerning tribal members are certainly *related* to the economic security and welfare of the tribe, they do not have a *substantial* impact on the tribe as a whole" and thus fall outside of *Montana*'s second exception. *Id.*, slip op. at 13-18 (emphasis in original). Ignoring the

NPEA's express language limiting its application to "all employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation," Navajo Nation Code tit. 15, § 604(A) (1995), the federal district court asserted that if "a consensual relationship was formed when the Plaintiff hired a member of the Navajo Nation as an employee," then "under this analysis, every employer in the nation would consent to tribal jurisdiction by hiring a tribal member," and this "would yield a result exactly opposite of the general proposition articulated by the Supreme Court; that generally Indian tribes lack civil authority over the conduct of nonmembers. . . ." *Atkinson*, slip op. at 14-15; *see also id.* at 17 ("if the termination of a Navajo employee were to trigger the second *Montana* exception, every employer nationwide that terminated such an employee would be subject to tribal jurisdiction").

To sustain these conclusions, *Montana* must be read to implicitly overrule *Williams v. Lee*--a precedent cited by *Montana* in support of *both* of its exceptions. *See Montana, 450 U.S. at 565-566* (citing *Williams v. Lee, 358 U.S. at 220, 223)*. It seems likely that Hugh Lee's Ganado Trading Post did not explicitly or implicitly consent to Navajo jurisdiction when it sold goods on credit to the Williams family and then used state court process to attach and unlawfully sell their sheep for non-payment. *See generally Williams v. Lee, 83 Ariz. 241, 319 P.2d 998, 1002-1003 (1958), reversed on other grounds, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). See also Strate v. A-1 Contrs., 520 U.S. 438 at 457, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)* ("*Montana*'s list of cases fitting within the first

exception . . . indicates the type of activities the Court had in mind: *Williams v. Lee, 358 U.S. 217, 223, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)* (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between non-member plaintiff and member defendants); . . .") If "*Montana* requires consent to jurisdiction" to be bargained for in "consensual relationships," where *Williams v. Lee* clearly did not, then *Montana* could easily have said that. It did not, and this court declines to read *Montana* as though it does.

The federal district court ruling in *Manygoats* is currently on appeal to the Ninth Circuit, though it appears that a settlement of the action may be pending. *See Atkinson Trading Co. v. Manygoats*, Case No. 04-15854 (9th Cir., appeal docketed May 4, 2004).

125 *Manygoats II* noted a possible exception to the application of the NPEA to non-Indian employers:

> Significantly, this case is distinguishable from *Montana Department of Transportation v. King*, a recent 9th Circuit Court case in which the court held that absent a state or federal statute or treaty, a tribe does not have jurisdiction to regulate the employment practices of state employees working to maintain a right-of-way through their territory. *191 F.3d 1108 (1999)*. The issue in *King* was narrowly limited to whether a tribe has jurisdiction over the employment practices of a state - *another sovereign* - when the state is engaged in performing one of its sovereign duties, namely the maintenance of the highway. *Id. at 1114. King* did not deal with

whether a tribe may impose employment regulations on *private* employers doing work on fee land within a Nation's territory and therefore has no bearing on the case before us.

Id. at P [42] (emphasis in original). *King* involved the State's non-compliance with a tribal hiring preference ordinance in performing state highway maintenance, rather than any adverse employment action taken against an employee who is a tribal member, and may be distinguishable from *Manygoats* for that reason as well. *See id.* at P [41] ("The regulation at issue is the NPEA, which governs the terms and conditions of employment of Navajo workers on the Nation's territory.")

126 *Arizona Public Service Co.*, No. A-CV-08-87.

127 *Office of Navajo Labor Relations ex rel Bailon v. Central Consolidated School District No. 22*, No. SC-CV-37-00 (Navajo 06/23/2004), *available at* http://www.tribal-institute.org/opinions/2004.NANN.0000008.htm.

128 *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98; *Manygoats v. Atkinson Trading Co.*, No. SC-CV-62-2000.

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129 *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo 08/18/2000), *available at* http://www.tribal-institute.org/opinions/2000.NANN.0000006.htm.

130 *Tuba City Judicial Dist. of the Navajo Nation v. Sloan*, No. SC-CV-57-97.

131 "Our district courts are courts of general jurisdiction under the Navajo Nation Code, 7 N.N.C. § 253, but their jurisdiction is limited by federal statutes and by United States Supreme Court case law." *Nelson v. Pfizer, Inc.*, No. SC-CV-01-02 (Navajo 11/17/2003), at P [20], *available at* http://www.tribal-institute.org/opinions/2003.NANN.0000002.htm.

132 *See Davis v. Navajo Tribe*, 4 Nav. R. 50, at P [22] (Navajo Ct. App. 05/12/1983), *available at* http://www.tribal-institute.org/opinions/1983.NANN.0000062.htm ("Defamation actions are fashionable in the employment law field these days, and they may or may not relate to employment, depending upon the circumstances.").

133 *Available at* http://www.tribal-institute.org/opinions/1983.NANN.0000042.htm

134 Of course, as *Nelson* reminds us, the exercise of Navajo court jurisdiction remains subject to due process considerations. *Nelson v. Pfizer, Inc.*, at P [40] ("Our courts, like other courts, must have both subject matter jurisdiction and personal jurisdiction to properly hear a case. *Yazzie v. Yazzie*, 5 Nav. R. 66, 68 (1985). Though, as we hold today, our subject matter jurisdiction over matters occurring on tribal land is broad, that does not mean our courts may hear any case with some impact on tribal members. Personal jurisdiction over the defendant is still required. *Sells v. Espil*, 6 Nav. R. 195, 197 (1990).") (also citing *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).*

135 A recent Ninth Circuit case has taken a different approach. In *Ford Motor Co. v. Todecheene, 394 F.3d 1170 (9th Cir. 2005)*, "Esther Todecheene, an on-duty law enforcement officer employed by the Navajo Department of Public Safety, died when her Ford Expedition patrol vehicle rolled over while she was driving on a dirt road within the Navajo Nation. . . . The road is a reservation road, maintained by the Tribe. There is no federal or state right-of-way, and the road is not located on non-Indian fee land." *394 F.3d at 1172* (citation omitted). Officer Todecheene's parents sued the manufacturer in Navajo tribal court, alleging that Officer Todecheene's death resulted from a defective seat belt mechanism in her Ford vehicle--one of a fleet of Ford vehicles purchased by the Navajo Nation for use by its officers. Ford rushed the litigation into the federal courts, challenging the Navajo court's jurisdiction.

Choosing to "confront the issue . . . whether the Tribe may assert jurisdiction over a nonmember for conduct on tribal land," and following the trend it perceived in cases such as *Atkinson* and *Hicks*, the panel ruled 2-1 that *Montana* applies to the jurisdictional issue regardless of the status of the land. *Id. at 1174-1179*. Applying *Montana* to the facts, *Ford* concluded that

> Although the tribe does have an interest in protecting the lives of its police officers on tribal roads, unfortunately that interest does not fit within the parameters of the self-government *Montana* exception. That exception has been narrowly defined as *encompassing events that interfere with a Tribe's ability to enact or be*

governed by its own laws. See Hicks, 533 U.S. at 360-61, 121 S.Ct. 2304.

Id. at 1182-1183 (emphasis added). According to the *Ford* majority, then, the Navajo Nation has an insufficient interest in protecting the safety of its own police officers--one of whom died in the line of duty while patrolling tribal lands on tribal roads using a tribal vehicle purchased by the Navajo Nation for her use--to justify the exercise of tribal civil jurisdiction over her parents' wrongful death claim against the party who allegedly caused her death.

What *does* it mean to have the "ability to enact and be governed by its own laws" if the Navajo Nation cannot extend the scope of its own laws to protect the very lives of its own police officers on its own lands, and in its own courts? When *does* the exception for "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe" apply?

Ford expresses concern that "'if *Montana*'s second exception requires no more'" than actually causing injury or death to tribal members, "'the exception would severely shrink the rule,'" *id. at 1181* (quoting *Strate, 520 U.S. at 458*), and then attempts to preserve the sanctity of the second *Montana* exception by narrowing it to the point of absolute abstraction, never to be applied in the real world. If *Ford* is correct, then as a matter of federal law the Navajo Nation *cannot* make and enforce its own tort law protecting its members against the dangerously defective products of others--clearly "prevent[ing] the Tribe from enacting or being governed by its laws." *Id. at 1183.* And *Ford* would necessarily subject claims of Navajo plaintiffs

arising on the reservation "to a forum other than the one they have established for themselves." *Fisher v. District Court of the Sixteenth Judicial District, 424 U.S. 382, 387-388, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976)*; *see Iowa Mutual, 480 U.S. at 16* ("Adjudication of such matters by any nontribal court also infringes on tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.").

Years ago, one discerning critic framed the essential query in these words: "If, Indians reasoned, justice is for society's benefit, why isn't our justice accepted?" Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* 9 (1969). A fair question, certainly, and one to which *Ford v. Todecheene* offers no satisfactory answer.

136 There is, however, another longstanding, if less frequently encountered, variety of federal "arising under "jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues. *E.g., Hopkins v. Walker, 244 U.S. 486, 490-491, 37 S. Ct. 711, 61 L. Ed. 1270 (1917).* The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues, see ALI, Study of the Division of Jurisdiction Between State and Federal Courts 164-166 (1968).

125 S. Ct. at 2367.

137 Plaintiffs also point to excerpts from the legislative history of the Tribal Justice Support Act of 1993. (*See id.* at 11 n.6 (quoting S. Rep. No. 88, 103d Cong., 1st. Sess 8 (1993); H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993); "Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492), at 9 (same).)

138 Plaintiffs pressed the identical argument in their Petition for a Writ of Certiorari, *Riggs v. San Juan County*, No. 02-1253 (U.S.S.Ct., filed February 6, 2003), at 12. As noted above, certiorari was denied on June 2, 2003. *See 539 U.S. 902, 123 S. Ct. 2246, 156 L. Ed. 2d 110 (2003).*

139 Plaintiffs also assail *Oliphant* as being "unmoored from any Congressional affirmative diminishment of Tribal Court jurisdiction," (*id.* at 8), a statement that is essentially accurate, as far as it goes. (*See supra*, at 75-77 & n. 81.)

140 In *United States v. Lara, 324 F.3d 635, 639 (8th Cir. 2003)* (en banc), the Eighth Circuit held that "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. . . . Once the federal sovereign divests a tribe of a particular power, it is no longer an inherent power and it may only be restored by delegation of Congress's power." The Supreme Court reversed. *United States v. Lara, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).*

141 As it turns out, then, the Court's contemporary formulation of the implied divestiture of inherent tribal

sovereignty in *Oliphant*, et al, merely reflects the Court's transitory reading of the policies of the "political branches" of the federal government, gauged at a particular point in time. Through the exercise of its "plenary and exclusive" power in Indian affairs, Congress remains free to "adjust" the legal status of Indian tribes and "relax restrictions on tribal sovereignty previously imposed by the political branches," essentially as Congress sees fit, thereby supplanting the Court's "judicially-made" limitations on inherent tribal sovereignty. *United States v. Lara, 541 U.S. 193, 200, 204-205, 207, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).*

It thus becomes possible for the Court to say of the 1990 legislative restoration of tribal criminal jurisdiction over nonmember Indians that "the tribes' possession of this additional criminal jurisdiction" over nonmember Indians "is consistent with our traditional understanding of the tribes' status as 'domestic dependent nations'"--after having previously held the tribes to have been *divested of that same jurisdiction* by reason of their "dependent" status. *Lara, 541 U.S. at 204-205* (quoting *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25 (1831)).* "True, the Court held in those cases that the power to prosecute nonmembers was an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress," *id. at 205*--or by "implication as a necessary result of their dependent status," according to the Court's opinions at the time. *See Duro v. Reina, 495 U.S. 676, 686-689, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).*

But these holdings reflect the Court's view of the tribes' retained sovereign status as of the time the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes' status.

. . . .

The Court in these cases based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change.

. . . .

Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change "judicially made" federal Indian law through this kind of legislation. . . .

Lara, 541 U.S. at 205, 206, 207 (citations omitted).

142 The County defendants also noted that *Hicks* held that tribal courts lack jurisdiction to entertain lawsuits under *42 U.S.C.A. § 1983*. (Cnty. Juris. Mem. at 13 (citing *Hicks, 533 U.S. at 366-367*).)

143 It does not appear that the issue of tribal civil jurisdiction over non-Indians under *Montana* was even on the table at that time. *See generally* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 Am. Indian L. Rev. 109 (1992) (describing

process leading to the enactment of the permanent amendment to *§ 1301(2)*); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts Over Non-Member Indians*, 38 Fed. B. News & j. 70 (1991); *see also* H.R. Rep. No. 102-61, at 7 (1991); S. Rep. No. 102-168 at 4 (1991) (describing amendment as "recognizing and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 102-261 (1991).

[**262] Neither did the 1993 Act or the 2000 Act.

144 Finding 6 of the 2000 Act amplifies the 1993 Act's Finding by noting the recognition of "tribal justice systems as the *most* appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands." *25 U.S.C.A. § 3651(6).*

145 *See, e.g.*, Frank Pommersheim, *Is There a Little (or Not So Little) Constitutional Crisis Developing in Federal Indian Law?: A Brief Essay*, 5 U. Pa. J. Const. L. 271, 284-285 (2003); L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 New Eng. L. Rev. 669, 674-675 (2003).

146 (*See* Cnty Juris. Mem. at 11 (absence of tribal ownership has been "[']**virtually conclusive of the absence of tribal civil jurisdiction.**[']" (quoting *Hicks, 533 U.S. at 360* (emphasis supplied by County defendants))); *but cf. Hicks, 533 U.S. at 382* & n.4 (Souter, Kennedy & Thomas, JJ. concurring) ("It is the membership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact," but "land status, for instance, might

well have an impact under one (or perhaps both) of the *Montana* exceptions." (citations omitted)).
[**268]
147 (*Cf.* Cnty. Juris. Mem. at 11-14.)

148 (San Juan Health District Defendants' Motion to Dismiss or for Summary Judgment, filed February 20, 2003 (dkt. no. 496), at 3.)

149 Footnote 9 of *MacArthur* reads:

> In another telling passage, the Court in *Hicks* stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." *Id. at 373, 121 S.Ct. 2304.*

150 *Montana*'s first exception speaks of "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," *450 U.S. at 565.* Footnote 3 of *Hicks* commented that the action of a state game warden in obtaining a tribal court search warrant did not qualify "as an 'other arrangement' within the meaning of this passage," because when "read in context, an 'other arrangement' is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed." *Hicks, 533 U.S. at 359 n.3* (emphasis in original).

The Health District defendants read this footnote as expanding *Hicks*' narrow holding into a general rule

immunizing "the official actions of governmental officials and employees" from tribal jurisdiction--a reading of *Hicks*' holding that plainly did not command the views of a majority of the Justices on the Court that decided the case, if anyone at all.

Nor does it persuade the court in this case.

151 More recently, the Navajo Supreme Court announced a higher pleading standard for jurisdiction over non-Navajos on fee land within the reservation:

> The facts the plaintiff must allege for jurisdiction over a non-Indian generally depend on the status of the land where the cause of action arose. If the case concerns tribal land the plaintiff needs only to allege specific facts showing that the cause of action arose on tribal land. See *PacfiCorp v. Mobil Oil Corp.*, No. SC-CV-27-01, slip op. at 6 (Nav.Sup.Ct. November 24, 2003); *Pfizer*, No. SC-CV-01-02, slip op. at 8.
>
> If the cause of action arises on non-Indian owned fee land within the Navajo Nation the plaintiff has a higher burden. The plaintiff must fulfill one of the two exceptions set forth in *Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981). Manygoats v. Cameron Trading Post,* No. SC-CV-62-00 (Nav.Sup.Ct. August 12, 2003). Under *Montana* the plaintiff must allege specific facts showing that the defendant either (1) has a consensual relationship with the Navajo Nation or its members that has a nexus to the dispute, or (2) that the defendant's conduct has a direct effect on the political integrity, economic security, or

health or welfare of the Navajo Nation. *Pfizer*, No. SC-CV-01-02, slip op. at 4-5. A bare statement that one or both of the exceptions is met, without more, is not enough.

The high threshold of *Montana* requires, however, that district courts allow further fact finding when the plaintiff requests it. In some cases, the plaintiff might not have the evidence available to it to properly allege fulfillment of one of the *Montana* exceptions without discovery or an evidentiary hearing on the jurisdictional issues. A plaintiff might be unable to establish the fact-intensive exceptions without the ability to seek evidence from the defendant through litigation. Some evidence, such as relationships between the Nation or its members and the non-Indian defendant, or information concerning the harm the defendant's activities have on the Nation, might be in the sole possession of the defendant. We therefore instruct the district courts that they must allow discovery or an evidentiary hearing, when properly requested, in cases concerning the *Montana* exceptions where the defendant or the court questions jurisdiction.

Because the factual allegations necessary for jurisdiction vary depending on the status of the land, it is important that the plaintiff, at the outset, allege specific facts concerning whether the cause of action arose on tribal land or non-Indian owned fee land. A statement that the dispute occurs within "the Navajo Nation," or in "the territorial jurisdiction of the Navajo Nation" is no longer enough. Plaintiffs must affirmatively plead the status of the land.

Dale Nicholson Trust v. Chavez, No. SC-CV-69-00 (Navajo 01/06/2004) at PP [26]-[29], http://www.tribal-institute.org/opinions/2004.NANN.0000004.htm (footnotes omitted).

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152 *Mustang Production Co. v. Harrison* adopted the standard articulated by the Ninth Circuit in *FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990)*, which requires deference to a tribal court's findings of fact and de novo review of its conclusions of law.

In *FMC*, the Ninth Circuit relied on the Supreme Court's decision in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57, 105 S. Ct. 2447, 2454, 85 L. Ed. 2d 818 (1985)*, to determine the appropriate standard of review. Pointing to the Supreme Court's statement that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court," *id. at 856, 105 S.Ct. at 2454*, the *FMC* court reasoned that a tribal court's factual findings should be reviewed for clear error, *905 F.2d at 1313*. The Supreme Court further stated in *National Farmers Union* that mandatory exhaustion of tribal court remedies is helpful because it provides other courts with the "benefit of their expertise." *471 U.S. at 857, 105 S.Ct. at 2454*. The Ninth Circuit interpreted this to mean that while federal courts may be guided by a tribal court's expertise, they have no obligation to defer to a tribal court's decision, and thus legal

questions should be reviewed *de novo*. *FMC, 905 F.2d at 1313-14*.

We are persuaded by the Ninth Circuit's analysis. . . .

94 F.3d at 1384. In *Smith v. Salish Kootenai College, 378 F.3d 1048 (9th Cir. 2004), rehearing en banc granted, 407 F.3d 1267 (9th Cir. May 13, 2005)*, the Ninth Circuit elaborated upon this standard: "However, the application of the facts to governing law is reviewed de novo as a mixed question of law and fact. See *Suzy's Zoo v. Comm'r of Internal Revenue, 273 F.3d 875, 878 (9th Cir. 2001)*." *378 F.3d at 1051 n.1*. And, according to *Smith*, "The party asserting that the tribal court had jurisdiction has the burden of proving the facts necessary to support jurisdiction." *Id.* (citing *Strate v. A-1 Contractors, 520 U.S. at 456*). *But see* Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms*, 24 N.M. L. Rev. 191 (1994) (tribal court findings on mixed questions of fact and law should be reviewed under clearly erroneous standard).

153 As the Tenth Circuit explained in *Atkinson*, the *National Farmers* case generally requires exhaustion of tribal remedies on jurisdictional issues in part because "the rule would encourage tribal courts to explain 'the precise basis for accepting jurisdiction' and 'provide other courts with the benefit of their expertise . . . in the event of further judicial review.' *Id. at 857*." *Atkinson, 210 F.3d at 1250-1251* (quoting *National Farmers, 471 U.S. at 857*).

154 According to plaintiffs, the Navajo court found that Mrs. Singer enjoyed "a unique 'in-law' status within the Tribe," and thus comes within the scope of protection afforded by the Navajo Preference in Employment Act, *Navajo Nation Code*, title 15, §§ 601 *et seq.* (1995). (Amended Complaint at 104.) However, the court made no specific findings concerning Ms. Singer's compliance with the NPEA's residency requirement, *see Navajo Nation Code*, title 15, § 614(A), nor did it address the requirement that she first exhaust her administrative remedies under the NPEA before coming into court. (*See supra* at 125-130.)

155 The term *hadane* is generally understood to be a masculine reference; *hazha 'aad* is the corresponding feminine reference.

156 (*See* Pltfs' Summ. Judg. Mem. (504), at 2-8 PP 1-27.)

157 As written, "the Navajo Preference in Employment Act ("NPEA") included spouses of Navajos and Indians from other Indian nations in the protected classifications of the Act, but provided that only Navajos could file labor complaints with the Commission. 15 N.N.C. §§ 610(B), 614 (1995)." *Staff Relief, Inc. v. Polacca*, No. SC-CV-86-98 (Navajo S. Ct. 08/18/2000), at P [21], *available at* http://www.tribal-institute.org/opinions/2000.NANN.0000003.htm ; *see* Navajo Nation Code, tit. 15, § 610(B) ("Any Navajo may file a charge . . . claiming a violation of his or her rights under the Act."). The Navajo Supreme Court made short work of that anomaly: "We rectify that shortcoming by ruling that under basic principles of equal protection of law, any person who is injured by a

violation of NPEA may file a claim with the Commission," including plaintiff Polacca, the non-Navajo spouse of a tribal member:

> The Navajo Nation may, at its option, deny certain benefits or privileges to non-Navajos without offending equal protection of the law, but as we have noted before, the NPEA is a general labor code. *Arizona Public Service Co. v. Office of Navajo Labor Relations*, 6 Nav. R. 246, 248 (1990). As such, it must be read to protect all employees within the Navajo Nation where NPEA provides protection in employment. Accordingly, we hold that on remand, Polacca has standing to pursue his claim against SRI.

Id. at P [22]. *Polacca* did not discuss the residency requirement of § 614(A) of the NPEA, and it does not appear that the Navajo Supreme Court has addressed § 614(A) in the five years since *Polacca* was decided. Absent clear Navajo case authority to the contrary, this court assumes that § 614(A) continues to define when "NPEA provides protection in employment" for non-Navajo spouses of tribal members.

158 The Navajo court made no finding that the Health District was "at all times herein and throughout this legal action, San Juan County's alter ego," or that "San Juan County is responsible for all of SJHSD's actions" (Navajo Ct. Cmplt. at 2 P 3, 33 P 301'); nor did the plaintiffs or the court articulate any viable legal theory under which the County could be held vicariously liable under Navajo, state, federal or international law for the Health District's employment actions.

159 Filing of pleadings asserting affirmative claims may reflect a litigant's submission to the *in personam* jurisdiction of the forum court, but it cannot confer *subject-matter* jurisdiction that the court would not otherwise have. *Cf. Finley v. United States, 490 U.S. 545, 559, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)* ("A party beyond the reach of a federal court's process may voluntarily submit to its jurisdiction over his person, but he cannot create subject-matter jurisdiction--by waiver, estoppel, or the filing of a lawsuit--over a non-Article III case."); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)* (parties cannot confer subject-matter jurisdiction on federal court by consent, estoppel, or waiver, but "none of this is true with respect to personal jurisdiction."). "One of the most basic principles of our jurisprudence is that subject-matter jurisdiction cannot be conferred upon a court by consent of the parties." *Gosa v. Mayden, 413 U.S. 665, 707, 93 S. Ct. 2926, 37 L. Ed. 2d 873 (1973)* (Marshall, Brennan & Stewart, JJ.,dissenting).

160 The plaintiffs have failed to sustain their burden to establish the requisite jurisdictional facts. *See, e.g., Smith v. Salish Kootenai College, 378 F.3d 1048, 1051 n.1 (9th Cir. 2004)* ("The party asserting that the tribal court had jurisdiction has the burden of proving the facts necessary to support jurisdiction." (citing *Strate v. A-1 Contractors, 520 U.S. at 456*)), *rehearing en banc granted, 407 F.3d 1267 (9th Cir. May 13, 2005).*

161 According to that court, "the defendants" failed to show how the District

can benefit itself . . . by *voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries*, and then treat the Navajo Nation's customs and traditions; Bill of Rights; *the Navajo Preference in Employment Act; the Utah merit system requirements*, and [IHS] contract obligations, all with impunity, and believe that the district is somehow immune from claims injury; . . .

(*Id.* at [20] (emphasis added).)

162 The *Hardy* opinion noted that "although *Berube* was a plurality opinion, a majority of the court concurred in the portion of the opinion that traced the historical development of the common law of employment contracts." *2002 UT 92, at P 21 n.8, 54 P.3d at 1170 n.8.*

163 It appears that the Health District has resisted this concept in the past, as reflected in their written employment policies. (*See* Navajo Ct. Cmplt. at Exh. 18 ("5.6 At Will Termination. The hiring of an employee (whether full-time, part-time, or short-term) is not a contractual relationship between San Juan Health Care Services and the employee, and either party may terminate the employment relationship at will.").)

164 Utah cases have consistently held that there is "an implied covenant of good faith and fair dealing in either at-will or other sorts of employment contracts." *Dubois v. Grand Central, 872 P.2d 1073, 1078 (Utah Ct. App. 1994).* As is true of other contracts, implied covenants of good faith and fair dealing cannot create "new, independent rights or duties not agreed upon by the

parties"; nor can implied covenants "change an indefinite term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge." *Brehany v. Nordstrom, Inc., 812 P.2d 49, 55 (Utah 1991).* Thus, any "just cause" requirement must arise from some other legal source.

165 It is unclear, *e.g.*, that Navajo law recognizes a common-law cause of action for "wrongful hiring," (*see* Navajo Ct. Cmplt. at 22-23 PP 215-220), that would hold the District liable to the plaintiffs because "but for the hiring of Mr. Wood, the employee plaintiffs may never have been harmed." (*Id.* at 22 P 217.) *Hicks* clearly holds that Indian tribal courts lack jurisdiction to entertain claims under *42 U.S.C.A. § 1983, 533 U.S. at 366-369*, but the import of that ruling for the claims of Riggs and Dickson remains unclear. *Cf. MacArthur, 309 F.3d at 1218 n.2.*

166 The Senate Committee on Indian affairs reads *Montana* this way. *25 U.S.C.A. § 3601(5)* reflects "the decision of the United States Supreme Court in the case of Montana v. United States, . . . with regard to *the authority of Indian tribal governments to provide for the protection of the health and safety of reservation residents* and the political integrity of the tribe. From all of the testimony presented to the Committee, it is clear that tribal justice systems are an integral part of the efforts of Indian tribal governments to exercise that authority." S. Rep. No. 103-88, at 8, 1993 WL 304728 (emphasis added).

167 *See Winer v. Penny Enters., 2004 ND 21, 674 N.W.2d 9 (2004)* (state court lacks subject matter jurisdiction over non-Indian motorist's action against

Indian motorist to recover for injuries sustained in automobile accident on state highway within exterior boundaries of Indian reservation; "If *Strate* signals a drastic departure from the state court jurisdictional principles enunciated in *Williams v. Lee* and its progeny, it is well hidden in the *Strate* decision." P 18, *674 N.W.2d at 16*).

168 The original defendant Board members included Commissioner Bill Redd, Commissioner J. Tyron Lewis, Roger Atcitty, Karen Adams, John Lewis, Commissioner Mark Maryboy (official capacity only), and Patsy Shumway (official capacity only). (*See* Navajo Ct. Cmplt. at 2-3 PP 4-7, 12-14, 16; Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 2003 WL 22428213 (U.S.S.Ct., 2003)*, at iii-iv.)

169 Apparently plaintiffs' notion--unhampered by bothersome concepts of duty, breach of duty, and causation--was that Ms. Schafer should be held jointly and severally liable to all three plaintiffs for *$ 18,000,000* in compensatory and punitive damages for failing to intervene on Ms. Singer's behalf in the adverse employment action taken by other Health District administrators that led to Singer's termination from employment. (*See* Navajo Ct. Cmplt. (Modified) at 42-45 ("Prayer for Relief").) Plaintiffs offer *no* explanation why Ms. Schafer should be held liable to Riggs or Dickson for $ 1.00, let alone $ 12,000,000.00. *See* Navajo R. Civ. P. 11.

170 The potential imposition of civil damages liability on Wood for what Dickson described as "racially insensitive remarks" (ONLR Complaint of Allison Dickson at 1, *available in* Pertinent Parts Navajo Ct.

R. ("ONLR Complaint" Tab)), itself raises questions under the free speech clause of the Indian Civil Rights Act, *25 U.S.C.A. § 1302(1) (2001)* ("No Indian tribe in exercising powers of self-government shall-- (1) make or enforce any law . . . abridging the freedom of speech"). In contrast to a defamatory statement, Wood's remark published no false statement of fact to others concerning Dickson or any other person. *See generally Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).* Liability for intentional infliction of emotional distress may also require more than proof of "insensitivity" or tastelessness of the speech at issue in order to overcome the free speech guaranty. *Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).*

171 The Navajo court made no findings of jurisdictional fact concerning any other claim Riggs or Dickson may have had against Wood personally, as distinguished from their claims against the District, that would satisfy Navajo Nation Code, tit. 7, § 253(B).

172 (*See* Plaintiffs' Briefing on *Montana*, filed February 13, 2003 (dkt. no. 492), at 10-11; "Federalism and Article III Court Limitations in Defining Navajo Tribal Court Jurisdiction" [unsigned original document submitted by plaintiffs' counsel], filed February 24, 2003 (dkt. no. 502), at 16-17 & n.21.)

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173 (*See* Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February

28, 2003 (dkt. no. 504).) Among other things, plaintiffs point to references to "territory" or "territories" in the *Revised Statutes of the United States* dealing with Indian tribes. (*See* Exh. J in Pltfs' 12/19/03 Compendium A/B, *excerpting* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 3-20 (2d ed. 1904), *available at* http://digital.library.okstate.edu/kappler/Vol1/HTML_files/AFF0003A.html.)

174 (*See* Pltfs' Mandamus Pet.)

175 In their Supreme Court mandamus petition, Plaintiffs asserted that "Full Faith and Credit will allow Tribal injunctions for emergencies and endangerment to life, to be rapidly carried out"; otherwise, "all Tribal rulings in conformity with limits of the statutes, as obligated by Treaty and BIA-judicial program contract, and official Executive agency action, are *ipso facto*, worthless in a non-Indian Utah Federal Court, as shown by this case." (*Id.* at 22, 23 (footnote omitted).)

176 *See also Mehlin v. Ice, 56 F. 12, 19 (8th Cir. 1893)*; *Exendine v. Pore, 56 F. 777 (8th Cir. 1893)*; *Cornells v. Shannon, 63 F. 305 (8th Cir. 1894)*; *Raymond v. Raymond, 83 F. 721 (8th Cir. 1897)*. As one recent commentary explains:

> The Eighth Circuit decided several similar cases, each involving collateral attacks to tribal court judgments. These included *Mehlin v. Ice*, *Exendine v. Pore*, *Standley v. Roberts*, and *Cornells v. Shannon*. In *Mehlin* and *Exendine*, which were argued in the same term and decided in 1893, the Eighth Circuit concluded that

judgments of the Cherokee Nation "are on the same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit." In *Cornells*, a Muscogee (Creek) Nation judgment was also construed equivalent to judgments of the territorial courts, to be afforded the same respect and the same faith and credit. Likewise, the *Standley* decision recognized the validity of a Choctaw quiet title action. Curiously, none of these early cases pursues the analogy of tribes to territories so as to reach the precise question of whether full faith and credit was due tribal court judgments under the general full faith and credit statute, *28 U.S.C. § 1738*. These opinions nonetheless indicate that by the turn of the last century, federal courts treated tribal court judgments with the same respect as those of any other court within the federal union.

Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: a Tribal Court Perspective*, 76 N.D. L. Rev. 311, 319-320 (2000) (footnotes omitted); *see also Raymond v. Raymond, 83 F. 721, 722 (8th Cir. 1897)* (judgment of Cherokee courts "entitled to all the faith and credit accorded to the judgments and decrees of territorial courts").

177 In *Jim*, the New Mexico Supreme Court announced its agreement "with the dissenting opinion of Judge Hernandez" of the New Mexico Court of Appeals "insofar as he held that the laws of the Navajo Tribe of Indians are entitled by Federal Law, *28 U.S.C. § 1738*, to full faith and credit in the courts of New Mexico because the Navajo Nation is a 'territory' within the

meaning of that statute. Cf. *Mackey et al. v. Coxe, 59 U.S. (18 How.) 100, 15 L.Ed. 299 (1855)*; . . ." *87 N.M. at 363, 533 P.2d at 752.* Citing *Standley*, Judge Hernandez had concluded that the Navajo code provisions governing repossession of consumer goods

> were a legitimate exercise of the authority residing in the Navajo Tribe to which we should accord full faith and credit. To do so would not only constitute compliance with *§ 1738, supra*, but would also constitute compliance with those authorities that have given full faith and credit to the judgments and orders of the courts of several of the Indian Tribes. See *Standley v. Roberts, 59 F. 836 (8th Cir. 1894)*; *Mehlin v. Ice, 56 F. 12 ([8th Cir.] 1893)*; *Cornells v. Shannon, 63 F. 305 (8th Cir. 1894).*

Jim v. CIT Financial Services Corp., 86 N.M. 784, 792, 527 P.2d 1222, 1230 (Ct. App. 1974) (Hernandez, J., dissenting).

178 *See, e.g., Okla. Stat. tit. 12, § 728* (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments); *Wis. Stat. § 806.245* (granting full faith and credit to judgments of Wisconsin Indian tribal courts); *Wyo. Stat. Ann. § 5-1-111* (granting full faith and credit to judicial decisions of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation); *Desjarlait v. Desjarlait, 379 N.W.2d 139 (Minn. Ct. App. 1985)*; *Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985)*; *Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (Mont. 1982)*; *Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980)*; *Red Fox v. Red Fox, 23 Ore. App. 393, 542 P.2d*

918 (Or. Ct. App. 1975); In re Lynch's Estate, 92 Ariz. 354, 377 P.2d 199 (Ariz. 1962).

Plaintiffs cite to *Utah Code Ann. 9-9-209* (2003) as having some bearing upon the question:

> **9-9-209. Tribal ordinance or custom given full force and effect.**
>
> Any tribal ordinance or custom adopted by an Indian tribe, band, or community in the exercise of any authority that it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action.

But this provision, read in context, governs in situations in which the State of Utah has assumed jurisdiction over Indian country pursuant to Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act of 1968 to require tribal consent. *See Utah Code Ann. §§ 9-9-201 through 9-9-213* (2003); Pub. L. No. 90-284, Title IV, §§ 401-406, 82 Stat. 78-80 (1968), codified at *25 U.S.C.A. § 1321-1326 (2001)*. Utah has never assumed jurisdiction over the portion of the Navajo Reservation in Utah, so the provisions of *Utah Code Ann. §§ 9-9-201 et seq.* have no relevance to this case.

179 *See* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6, 94 Stat. 1785 (1980), *codified at 25 U.S.C.A. § 1725(g) (2001)*; Indian Land Consolidation Act, Pub. L. No. 97-459, § 208, 96 Stat. 2517 (1983), *codified at 25 U.S.C.A. § 2207 (2001)*; National Indian Forest Resources Management Act, Pub. L. No. 101-630, Title III, § 307, 104 Stat. 4532, 4537

(1990), *codified at 25 U.S.C.A. § 3106(c) (2001)*; American Indian Agricultural Resource Management Act, Pub. L. No. 103-177, Title I, § 103, 107 Stat. 2011, 2015 (1993), *codified at 25 U.S.C.A § 3713(c) (2001)*; Violence Against Women Act, Pub. L. No. 103-322, Title IV, § 40221a, 108 Stat. 1930 (1994), *codified at 18 U.S.C.A. § 2265 (2000 & Supp. 2005)* (full faith and credit for tribal court domestic violence protection orders); Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994), *codified at 28 U.S.C.A. § 1738B (Supp. 2005)*.

180 *But see Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Tribal Ct. App. 1997) (*§ 1738*'s reference to "any court of any such State, Territory or Possession" is "a geographic, rather than political, designation"), *excerpted in* Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 269-83 (4th ed. 2003).

181 The Navajo court distinguished *Jim* on the ground that "the real issue presented by the facts of that case related to the conflicts of law doctrine. The Supreme Court determined that, under New Mexico's Uniform Commercial Code, parties to a contract may determine which law, given the applicability of more than one, shall govern." *Id.* at P [39].

182 "The Navajo Nation law of recognition of foreign court decisions, statutes or acts of state (also known as "public acts") is comity. *in re Guardianship of Chewiwi*, 1 Nav. R. 120, 126 (1977); *Anderson Petroleum Serv., Inc. v. Chuska Energy & Petroleum Co.*, 4 Nav. R. 187, 189-91 (W.R. Dis. Ct. 1983); *Pela v. Peabody Coal Co.*,

No. A-CV18-89, slip op. at 16-17 (decided September 28, 1990) Under the Navajo Nation doctrine of comity, a foreign statute, court decision or public act must comply with Navajo Nation public policy." *Id.* at P [21]. [**340]

183 The plaintiffs' argue that "this Court can sustain, under principals [sic] of full faith and credit, the Navajo Court Orders as an exercise of 'inherent sovereign' rights," because the Navajo Nation is a federal "territory" under *§ 1738* by virtue of Congress' plenary power over Indian affairs. (Plaintiffs' Motion for Summary Judgment for Enforcement of the Navajo Court Orders under Full Faith and Credit or Comity and Response of the District and County's Briefs and Motions for Summary Judgment [& Memorandum in Support], filed February 28, 2003 (dkt. no. 504), at 10; "Plaintiffs' Briefing on *Montana*," filed February 13, 2003 (dkt. no. 492), at 10-11.)

These propositions appear to be contradictory only because they really are contradictory.

184 *See, e.g.*, Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: a Tribal Court Perspective*, 76 N.D. L. Rev. 311 (2000); Robert N. Clinton, *Comity & Colonialism: the Federal Courts' Frustration of Tribal <<-- --> Federal Cooperation*, 36 Ariz. St. L.J. 1 (2004); Philip S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga. L. Rev. 365 (1994); Paul E. Frye, *Lender Recourse in Indian Country: a Navajo Case Study* 21 N.M. L. Rev. 275, 314-318 (1991); William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23

Cal.W.L.Rev. 219 (1987); Note, *Recognition of Tribal Decisions in State Courts*, 37 Stan. L.Rev. 1397, 1414 (1985); Fred Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. Rev. 133 (1977).

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185 *See, e.g.*, Gunn, *Compacts, Confederacies, and Comity;* Robert Laurence, *Tremors: Justice Scalia and Professor Clinton Re-shape the Debate over the Cross-boundary Enforcement of Tribal and State Judgments*, 34 N.M. L. Rev. 239 (2004); Kelly Stoner & Richard A. Orona *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. Rev. 381 (2004); among others.

186 *See* Vine Deloria, Jr., *Indian Law and the Reach of History*, 4 J. Contemp. L 1 (1978); Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 3.1 Ariz. L. Rev. 203 (1989).

187 In *Von Hake*, this court noted that

> under the Evarts Act, or Circuit Court of Appeals Act of 1891, Act of March 3, 1891, [c. 517,] 26 Stat. 826, federal courts of appeals were established in nine designated circuits. Utah was located in the Eighth Circuit under that scheme. In 1929, Utah was transferred to the newly created Tenth Circuit pursuant to the Act of February 28, 1929, c. 363, 45 Stat. 1346, where it has since remained. This Court is, as a general rule, required to follow the decisions of the Court

of Appeals for this Circuit, 1B Moore's Federal Practice P 0.402(1) at 61-62 & nn. 28-30 (2d ed. rev. 1980), whatever its numerical designation may be or have been.

Id.

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188 Plaintiffs' counsel has pressed the issue here and elsewhere. (*See, e.g.*, Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 2003 WL 22428213 (U.S.S. Ct., 2003), at 22*; Reply Brief to Respondent San Juan Health Services District's Brief in Opposition, filed July 30, 2003, 2003 WL 22428215, at *3-*6.)

189 Navajo R. Civ. P. 54 reads:

54(a) Judgment. Except for default judgments, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A default judgment shall not be different in kind or exceed the amount requested in the prayer for relief.

54(b) Multiple Claims or Multiple Parties. During a lawsuit the court may enter judgments that dispose of fewer than all of the parties or claims. Unless specifically excepted by other rules or by caselaw these are not final judgments from which an appeal lies. Unless a stay is granted pursuant to *Rule 62(e)* such judgment can be enforced after entry.

54(c) Costs. In the judgment the court may order one or more of the parties to pay the costs. Costs include filing fees, costs of service, jury, and witness costs.

Navajo R. Civ. P. 58(a) reads:

58(a) Entry. All judgments shall be in writing and signed by the judge who heard the case. The signing of the judgment constitutes entry of judgment. The clerk of the court must make every attempt to forward the judgment to the parties immediately after entry. The judgment is not effective before entry, except that for circumstances and on notice as justice may require, the court may enter a judgment nunc pro tunc, and the reasons shall be entered of record.

190 Navajo Nation Code, tit. 7, § 801(A) reads in part:

Every person aggrieved by any final judgment or other final order of a District Court of the Navajo Nation, or such other final administrative orders as provided by law and desiring to appeal shall within 30 days after the day such judgment or order is rendered appeal to the Supreme Court stating fully the grounds for appeal.

"Interlocutory appeals are not allowed within the Navajo court system." *Billie v. Abbott*, 5 Nav. R. 201, 203 (1987).

191 In *Litzin*, "actual, statutory, and punitive damages and costs were awarded to Litzin, which are clear indicators that the substantial rights of the parties

were litigated and the merits were decided. In essence, the very fact that the District Court awarded damages concludes that the substantial rights of the parties were litigated and decided on the merits. Therefore, the District Court has disposed of the case and reached a final judgment." *Id.* at P [22].

[**353] That seems pretty clear.

192 *Billie v. Abbott* (1987) elaborated upon the question of finality:

> We took the opportunity to touch upon the concept of finality of district court orders in the context of appellate jurisdiction in *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (1986). There we recognized that a final court order results after all the substantial rights of the parties have been litigated and decided on the merits by the district court. *Chuska Energy Company*, *Id.* We further said that, "the entry of the final decision must preclude further proceedings in the lower tribunal." *Id.* at 102.
>
> In effect, an order that precludes further proceedings on the merits will terminate a case. Thus, an order that terminates a case is final for purposes of appealability, even where it does not determine the merits of a case. In this case, the order denying the motion to dismiss did not terminate the case. We hold that an order denying a motion to dismiss is interlocutory and not final for purposes of appealability.

> Interlocutory appeals are not allowed within the Navajo court system. *Chuska Energy Company, Id.* . . .
> *Id.* at PP [19]-[21] (footnote omitted).

193 Even if neither party raises mootness as an issue the court has "an affirmative obligation to consider this [jurisdictional] issue *sua sponte*." *Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass'n, 420 F.3d 1082, 1088 (10th Cir. 2005)* (citing *Tandy v. City of Wichita, 380 F.3d 1277, 1290 n.15 (10th Cir. 2004))*.

194 *See Riley v. INS, 310 F.3d 1253, 1257 (10th Cir. 2002)* (exceptions to mootness include cases in which "(1) secondary or collateral injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceased an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action." (internal quotation marks omitted)).

195 Nor may plaintiffs avoid the mootness issue by pressing for *declaratory* relief that the Navajo court orders were enforceable.

> It is well settled that mootness principles "govern[ ] cases brought . . . under the Declaratory Judgment Act." *Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 n. 3 (10th Cir.1994)*, superseded by statute on other grounds as stated in *Walker v. UPS Inc., 240 F.3d 1268, 1278 (10th Cir.2001)*; *Esparza v. Valez, 862 F.2d 788 at 791-92 (1988)* (claims for prospective declaratory and injunctive

relief mooted by Colorado Supreme Court decision). Otherwise, a declaratory judgment could be an improper advisory opinion. *Cox, 43 F.3d at 1348.* "With respect to declaratory relief, we look beyond the initial controversy which may have existed at one time and decide whether the facts alleged show that there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Beattie v. United States, 949 F.2d 1092, 1094 (10th Cir. 1991)* (internal quotation marks, brackets, and ellipses omitted).

Moongate Water Co., Inc. v. Dona Ana Mutual Domestic Water Consumers Ass'n, 420 F.3d 1082, 1088 (10th Cir. 2005).

196 In *Largo,* there was a dispute as to whether the Navajo Nation Labor Commission correctly applied the "substantially justified" standard in awarding attorney's fees. The court articulated the proper standard of review for an award under the NPEA:

> Section 12 of the NPEA leaves to the Commission the task of evaluating whether a respondent's position is "substantially justified." On appeal, our review is limited to determining whether the Commission's decision was arbitrary, capricious, or not supported by the evidence. Only if the decision was clearly an abuse of the Commission's discretion will it be overturned.

Largo, at P [76].

197 (Letter to the Court from Susan Rose, Esq., dated September 24, 2004.)

198 "'The Navajo Courts have the power to determine the validity of resolutions passed by the Navajo Tribal Council.' *Thompson v. Navajo Nation*, 6 Nav. R. 181, 183 (Nav. Sup. Ct. 1990), citing *Halona v. McDonald*, 1 Nav. R. 189 (Nav. Ct. App. 1978) (emphasis added).

199 As the *Judy* court explains:

> White suggests that *Halona* precludes standing. He argues that *Halona* limits suits by private citizens to matters for which legislative acts intend improper expenditures of the public treasury. . . . We view *Halona* from a different perspective. While the practical aspects of *Halona* pointed to public expenditures for private purposes, we believe the reasoning behind the decision is most instructive here. The Court's ultimate holding was not that a private citizen was entitled to challenge the expenditure of public monies for private purposes, but that a private citizen had standing to challenge the legitimacy of public acts.

Id. at P [22].

200 But here, no action of the Navajo Nation Council was at issue.

201 The court reached the same conclusion as to the County defendants, but this court's current ruling on the jurisdictional question renders further

consideration of their sovereign immunity defense unnecessary.

202 This *Montana* case held that collateral estoppel barred the United States from relitigating in federal district court the validity of a State gross receipts tax on public contractors that had previously been upheld in Montana state court litigation--litigation over which the United States had exercised direct control. *440 U.S. at 153-164*. It thus proves inapposite to the issue at hand

203 If "law of the case" is the "doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal," *Black's Law Dictionary* 893 (7th ed. Bryan A. Garner, ed. 1999), then the doctrine would have no application here because, as the Health District defendants point out, the court of appeals "declined to review the Court's decision on sovereign immunity," and thus rendered no decision in the former appeal. *See Macarthur v. San Juan County, 309 F.3d 1216 at 1227-1228 (2002)*.

204 (*See* Order, filed March 6, 2001 (dkt. no. 168).)

205 *Gilham* expressly "decline[d] to address whether agents of a State may be sued in tribal court or whether States may be subject to a contract suit in tribal court. Our holding," the panel emphasized, "is limited to the facts presented by this case: an individual filing a tort action against Montana in Blackfeet tribal court." *Id. at 1140 n.8*.

206 As *Tindley* notes,

In 2004, the legislature repealed the Governmental Immunity Act, codified at *Utah Code Ann. §§ 63-30-1* to -38 (1997 & Supp.2003). In its place, the legislature enacted the Governmental Immunity Act of Utah, codified at *Utah Code Ann. §§ 63-30d-101* to -904 (2004). Pursuant to the provisions of the new act, all injuries alleged to have been caused by a governmental entity before July 1, 2004, are governed by the former act.

2005 UT 30, P 1 n.1, 116 P.3d at 297 n.1. Plaintiffs' claims in this case are thus governed by the older version of the statute.

207 "This inquiry [was] mandated by section 63-30-3(1), which establishes the general principle of governmental immunity subject to certain exceptions. "Except as may be otherwise provided in this chapter, all governmental entities are immune from any injury which results from the exercise of a governmental function." *Lyon v. Burton, 2000 UT 19, 2000 UT 55, P 14, 5 P.3d 616, 621 (Utah 2000)* quoting Utah Code Ann. § 63-30-3(1) (repealed 2004) (emphasis added)).

208 The Act makes an exception for actions against the government employee "whose act or omission gave rise to the claim" where "the employee acted or failed to act through fraud or malice," who may be held personally liable. Utah Code Ann. § 63-30-4(3)(b)(i), (4)(a) (Supp. 2003) (repealed 2004).

209 Utah law mandates strict compliance with the requirements of the Utah Governmental Immunity Act. See, e.g., *Hall v. Dep't of Corr., 2001 UT 34, P14, 24*

P.3d 958, 963; *Rushton v. Salt Lake County, 1999 UT 36, P 19, 977 P.2d 1201, 1203-1204.*

210 (*See* "Answer to Complaint for Damages and Counterclaim, filed June 23, 1999, in *Singer, et. al. v. San Juan County, et al.*, Case No. SR-CV-162-99-CV, at 28-42, *available in* Pertinent Parts Navajo Ct. R. ("Complaint for Damages" Tab).)

211 As to whether the Navajo Nation court should entertain actions against the state of Arizona; this has been answered in the Navajo Court of Appeals (now Navajo Supreme Court) ruling in *Hubbard v. Chinle School District, et. al.*, 3 Nav. R. 167 (1982). *Hubbard* involved a suit by Arizona state school district employees against the Chinle school district in Chinle District Court. The district court ruled that it had jurisdiction, but exercised discretion under the doctrine of comity and declined jurisdiction. On appeal, Navajo Nation Court of Appeals ruled that Navajo Nation courts do indeed have jurisdiction over suits against a foreign sovereign, using international law the basis for its rationale. Accordingly, the appeals court ruled that the State of Arizona is a foreign government and it should be recognized as such. The jurisdiction of Navajo Nation courts is inherent and existed prior to the creation of the State of Arizona.

Tracy v. Yazzie, No. WR-CV-313-85 (Navajo S. Ct. 09/16/1986) at P [14], *available at* http://www.tribal-institute.org/opinions/1986.NANN.0000009.htm.

212 "Like foreign sovereign immunity, tribal immunity is a matter of federal law." *Kiowa, 523 U.S. at 759.*

213 The Navajo Supreme Court acknowledges that "ordinarily, a legislative body must waive sovereign immunity through explicit language in the statute. See, e.g., *United States v King, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969).*" *Tso v. Navajo Housing Authority,* No. SC-CV-10-02, at P [32] (Navajo S. Ct. 08/26/2004), *available at* http://www.tribal-institute.org/opinions/2004.NANN.0000013.htm (emphasis added).

214 Navajo law governs legal relationships within the scope of its powers of self-government. "Because the Navajo Nation retains sovereign authority to regulate domestic relations laws, including marriage of its Indian subjects, Navajo law is dispositive as to the validity of the marriage in question. See *Montana v. United States, 450 U.S. 544, 564, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)* ('Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members')." *United States v. Jarvison, 409 F.3d at 1225.* As explained above, the Navajo Nation possesses the inherent civil authority to regulate employment contracts involving Navajo members within Navajo boundaries.

215 No cause of action for breach of contract was pleaded in either the original or amended Navajo court complaints, and from the Navajo court's orders, it appears that no contractual theory had been asserted by Riggs or Dickson, at least as of March of 2000. Instead Dickson's claim concerning the District's alleged failure to abide by its written employment policy concerning job tenure was wedged into two of the plaintiffs' civil rights claims (free speech, due

process), and at least one paragraph of the "malfeasance in office" claim. (*See* Navajo Ct. Cmplt. at 18 P 175 ("SJHSD refuses to hire Mr. Dickson as a regular employee"); 18 P 180 ("Mr. Dickson spoke out about the CIB policy and Mr. Wood[']s reference liking [sic] it to a 'dog tag' and has not been given his full time status."); 22 PP 213-214 (denial of "any type of a fair and impartial hearing to be given his permanent full time status"); 39 P 347 ("Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status").)

216 Section 63-30-10(2) was intended to protect the State from tort liability for the intentional tortious conduct of its own agents and employees. That, of course, is a legitimate purpose consistent with the general law of agency. As a general rule, masters and principals are not liable for the intentional torts of agents or employees unless the tort is committed within the scope of employment. See *Hodges v. Gibson Products Co., 811 P.2d 151, 156 (Utah 1991)*; *Birkner v. Salt Lake County, 771 P.2d 1053, 1056-59 (Utah 1989)*; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 70, at 505 (5th ed. 1984). It is also a general rule that intentional torts such as assault and battery are not within the scope of employment. See *Birkner v. Salt Lake County, 771 P.2d 1053 at 1056-59 (1989)*; *Hodges, 811 P.2d at 156-57.*

S.H. By and Through R.H. v. State, 865 P.2d 1363, 1366 (Utah 1993) (Stewart, J., dissenting).

217 Ateitty's immunity would apply regardless of whether the conduct in question occurred within or outside the Navajo Reservation boundaries.

218 From the Navajo court's orders at issue, this court could glean no similar finding of malice pertaining to plaintiffs' other tort claims (*e.g.* intentional infliction of emotional distress, violation of civil rights), so the Act's exception of such claims from its waiver of immunity would still apply to bar plaintiffs' claims. Utah Code Ann. § 63-30-10(2) (Supp. 2003) (repealed 2004); *see Apffel v. Huddleston, 50 F.Supp. 2d 1129, 1141 (D. Utah 1999)* (plaintiffs fail to allege any *well-pleaded facts* that defendants acted with 'malice', i.e., that defendants acted with any 'ill will' toward Mr. Apffel. . . . Thus, plaintiffs' claims are barred under the Utah Governmental Immunity Act and should be dismissed." (citation omitted)).

219 The free assembly claim pleaded in their Navajo court Complaint appears to be asserted solely on behalf of Ms. Singer. (*See* Navajo Ct. Cmplt. at 19 PP 184-190) ("Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States.").

220 Had they brought *§ 1983* claims in a federal or state district court, the Health District would have been unable to raise its sovereign immunity as a bar to the claims, even in the state court. *See Howlett by and through Howlett v. Rose, 496 U.S. 356, 361-383, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990)* (states cannot apply sovereign immunity rules to bar *§ 1983* claims against local governments in state court); *Martinez v. California, 444 U.S. 277, 284, 100 S. Ct. 553, 62 L. Ed. 2d 481 (1980)* ("it is clear that the California immunity statute does not control this *[§ 1983]* claim even though the federal cause of action is being asserted in the state courts").

Section 1983's "history and purposes . . . together with the way it has been interpreted, render it a powerful legislative sword." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 1:1 (4th ed. Rev. 2004). Here, the plaintiffs cast aside the sword of *§ 1983* in favor of the untested steel of civil rights litigation against subdivisions of a State in a tribal court.

221 *See, e.g., Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)* (permitting employment discrimination claim against a member of Congress under Due Process Clause); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)* (permitting implied action under *Fourth Amendment* against federal narcotics agents).

222 *See* 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 6:59 (4th ed. Rev. 2004) ("the Court's message is clear: *§ 1983* plaintiffs are to pursue only their *§ 1983* damages remedies against local governments, and cannot rely on *Fourteenth Amendment* damages remedies."); *Monell v. Department of Soc. Servs., 436 U.S. 658, 712, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* (Powell, J., concurring) (discussing whether the Court should "imply cause of action directly from the *Fourteenth Amendment*").
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223 This Circuit takes the position that a *Bivens*-style action implied directly under the *Fourteenth Amendment* will not lie against state or local employees in their individual capacities where *§ 1983* is available, *see Stanko v. Mahar, 419 F.3d 1107, 1110 (10th Cir.*

2005) ("*Bivens* creates a remedy for violations of constitutional rights committed by federal officials acting in their individual capacities. Mr. Maher is a state brand inspector. Therefore, this action arises, if at all, pursuant to *42 U.S.C. § 1983* rather than *Bivens.*"), joining other circuits that have reached the same conclusion. *See, e.g., Baxter by Baxter v. Vigo County School Corp., 26 F.3d 728, 732 n. 3 (7th Cir. 1994); Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992), cert. denied, 506 U.S. 1081, 113 S. Ct. 1049, 122 L. Ed. 2d 357 (1993); Pauk v. Board of Trustees of the City Univ. of New York, 654 F.2d 856, 865 (2d Cir.1981)* ("when *§ 1983* provides a remedy, an implied cause of action grounded on the Constitution is not available."); *Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979)* (en banc) (per curiam), *cert. denied sub nom. Turpin v. City of West Haven, 449 U.S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980). Cf. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)* ("The question of whether . . . we should, by analogy to our decision in *Bivens* . . . imply a cause of action directly from the *Fourteenth Amendment* which would not be subject to the limitations contained in *§ 1983*, is one which has never been decided by this Court.").

224 The argument that the Navajo court must exercise its adjudicative authority over the District in order to assure the Navajo people "equal protection of the laws" misapprehends that court's duty under the Act, *viz.*, to assure Navajo people the equal protection of Navajo laws in the Navajo Nation's exercise of its powers of self-government.

225 *See* Navajo Nation Code, tit. 1, § § 3, 4 (1995):

> Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged *by the Navajo Nation* on account of sex nor shall any person within its jurisdiction be denied equal protection *in accordance with the laws of the Navajo Nation*, nor be deprived of life, liberty or property, without due process of law. . . .
>
> The *Navajo Nation Council* shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition *the Navajo Nation government* for a redress of grievances.

Id. (emphasis added.)

226 *Sosa* cites to Humphrey, "The UN Charter and the Universal Declaration of Human Rights," in *The International Protection of Human Rights* 39, 50 (E. Luard ed. 1967) (quoting Eleanor Roosevelt calling the Declaration "'a statement of principles ... setting up a common standard of achievement for all peoples and all nations'" and "'not a treaty or international agreement ... imposing legal obligations'").

227 *Sosa* concedes that the Declaration "has nevertheless had substantial indirect effect on international law." *Id.* (quoting Ian Brownlie, *Principles of Public International Law* 535 (6th ed. 2003) (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers")).

228 *309 F.3d at 1218 n.2.* (*See also* Tr. 2/24/2003, at 40:19-25, 41:14-20 (the "Navajo court orders address Navajo law issues, Navajo torts, Navajo denial of rights and harm to Navajo patients" (Ms. Rose)).) Plaintiffs' counsel made essentially the same representation to the United States Supreme Court in 2003. (*See* Petition for Writ of Mandamus and Prohibition, *In re Riggs, 539 U.S. 956, 123 S. Ct. 2665, 156 L. Ed. 2d 653, 2003 WL 22428213 (U.S.S. Ct., 2003), at 1* ("The *Navajo injunction and subsequent orders cite to no relief beyond Navajo law relief.*") (emphasis in original); *id. 539 U.S. 956 at 5 n.12* ("all tort claims are Navajo tort claims"); Reply Brief to Respondent San Juan Health Services District's Brief in Opposition, filed July 30, 2003, 2003 WL 22428215, at *7 ("The Relief *sought here*, is purely Navajo law/Indian civil rights relief within the Navajo Court's *exclusive* jurisdiction.") (emphasis in original); Petitioner's *Rule 15* Supplemental Brief, filed September 14, 2003, 2003 WL 22428219,at *1 ("This case involves this Court enforcing Navajo Court orders under *28 U.S.C. 1738* full faith and credit, against all respondents as listed in the petition, for Navajo law violations, harming two Navajo enrolled members and the spouse of a Navajo enrolled member, within Navajo borders.")

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229 Of the four civil rights claims, only the equal protection claim makes explicit reference to the NPEA. (*See* Navajo Ct. Cmplt. at 85 Cal. 545, 26 P 244; Navajo Ct. Cmplt. (Modified) at 26-27 P 244 (same).) Otherwise, the plaintiffs' pleadings refer to the NPEA in one introductory paragraph listing several bases for the plaintiffs' pleadings. (*See id.* at 32 Kan. 646, 5 P 27 ("That these proceedings are brought under Navajo

law, including but not limited to . . . the *Navajo Preference in Employment Act*, . . .").); Navajo Ct. Cmplt. (Modified) at 65 Cal. 301, 4 P 17 (same).) The plaintiffs' "Memorandum of Law" annexed as "Attachment C" to the original Complaint advised the Navajo court that it "may look to the (1) *Navajo Preference in Employment Act ('NPEA')*, (2) contractual fiduciary responsibilities; (3) the Navajo Nation Bill of Rights; (4) common law and customs and traditions; (5) United Nations Declaration of Human Rights, and, in certain respects (6) Utah law, for its jurisdiction." ("Attachment C" to Navajo Ct. Cmplt. at 3, *available in* Pertinent Parts Navajo Ct. R. ("Memorandum SMJ" Tab).) The Memorandum argues the applicability of the NPEA for four pages, even quoting Navajo Nation Code, tit. 15, § 610(K), empowering the *Navajo Nation Labor Commission* to grant "preliminary relief in the form of an injunction or other equitable remedy," but without any reference to the Labor Commission's primary jurisdiction and the corresponding exhaustion requirement. It also refers to § 614's coverage of non-Navajo spouses, but without mention of its one-year residency requirement. (*Id.* at 4.)

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230 (*See* Navajo Ct. Cmplt. at 17-22 PP 170-214; *id.* at 26-31 PP 243-280; *cf. id.* at 39 P 347 ("Mr. Woods [sic] refused to give Mr. Allison Dickson his full time permanent employment status")) This appears to be particularly crucial to Dickson because he pleaded no claim of breach of contract before the Navajo court, and apart from the free speech and due process claims, no other cognizable pleaded claim addresses the dispute over his "temporary" employment status. (*See id.* at 17-33 PP 170-300 ("PLAINTIFFS' CLAIMS" [excluding

plaintiffs' "backdrop" pleading as to "misfeasance and malfeasance," *see supra* n. 31]); Navajo Ct. Cmplt. (Modified) at 18-35 PP 170-300 (same); *id.* at 40-42 PP 349-352 ("Supplemental Claims").)

231 The Navajo court argued with this: "The defendants have . . . failed to show how a service district, a minor political subdivision is an "arm of the state" with immunity under Alden, et al. v. Maine, . . . when Alden exempts minor political subdivisions from immunity, and failed to show how civil rights violations were given immunity, when Alden v. Maine exempts those types of injuries from immunity, and Alden did not address Navajo civil rights as defined within Navajo custom and traditions . . . ." (December 28, 1999 Order at [19] (citing *Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).*)

Alden's reference to immunity as an "arm of the State," alluded to in the December 28, 1999 Order, pertains to the States' *Eleventh Amendment* immunity from suit in federal court, not common-law sovereign immunity from suit without its consent. To that extent, the Navajo court was correct in noting that *Eleventh Amendment* immunity did not extend to political subdivisions, including special service districts. *See* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3524, at 130 (2d ed. 1984) ("If the defendant is a county, municipality, municipal agency, or an officer thereof, the general rule is that the *Eleventh Amendment* will not bar the action since these entities are not considered arms of the state." (footnote omitted).) But *Eleventh Amendment* immunity does not apply in tribal court, and these defendants did not attempt to raise

Eleventh Amendment immunity before the Navajo court.

Alden held that the States' sovereign immunity from private suit *in their own courts* is beyond congressional power to abrogate by Article I legislation, just as the States' *Eleventh Amendment* immunity from suit in federal court had been held to be beyond Congress' Article I powers in *Seminole Tribe v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*, and *Blatchford v. Native Village of Noatak. Alden* observed that "sovereign immunity derives not from the *Eleventh Amendment* but from the structure of the original Constitution itself." *527 U.S. at 728.* The *Eleventh Amendment* "confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.*

As the court explained in its initial decision in this case, "*Alden* is relevant only to the extent that it provides a comprehensive history of sovereign immunity and the presuppositions behind the *Eleventh Amendment.*" (October 30, 2000 Decision at 17-18.)

232 "Justice Souter wrote, "Petitioners are certainly correct that 'tribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,' since this Court's own pronouncements on the issue have pointed in seemingly opposite directions." *533 U.S. at 376* (comparing *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)*, and *United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975)*, with *Oliphant v. Suquamish Indian Tribe,*

435 U.S. 191, 209, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)). See also id., 533 U.S. at 387 (O'Connor, Stevens & Breyer, JJ. concurring in judgment) ("Part II of the Court's decision [in *Hicks*] is unmoored from our precedents").

233 *See* Navajo Nation Code, tit. 7, § 253(B) (1995) ("The District Courts of the Navajo Nation shall have original jurisdiction over . . . all civil actions in which the defendant is a resident of Navajo Indian Country").

234 As discussed above, this exhaustion requirement may initially embrace the plaintiffs' non-NPEA claims against the District as well. (*See supra*, at 125-128.)

No. 01-4001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DR. STEVEN MACARTHUR; DR. NATHANIEL PENN; MICHELLE LYMAN; HELEN VALDEZ; CANDACE LAWS; PAUL KEITH; DOROTHY KEITH; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; ALISON DICKSON; CANDACE HOLIDAY; NICOLE ROBERTS; DONNA SINGER; FRED RIGGS, Plaintiffs-Appellants, v. SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; MARK MARYBOY, Commissioner, official capacity only; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; DR. JAMES D. REDD; DR. L. VAL JONES; DR. MANFRED R. NELSON; RICHARD BAILEY; SAN JUAN FOUNDATION; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE, also known as Laurie Walker; FARMER'S/TRUCK INSURANCE; ST. PAUL'S INSURANCE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; R. DENNIS ICKES; LAURIE SCHAFER, Defendants-Appellees.

October 7, 2002, Filed

JUDGES: Before EBEL, McKAY, and LUCERO, Circuit Judges.

OPINION BY: LUCERO

OPINION

LUCERO, Circuit [*2] Judge.

Key to our determination of this appeal is the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law. Contrary to the district court's ruling, we conclude that resolution of this question lies in Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981) (defining the scope of tribes' inherent sovereignty), rather than in the doctrine of state sovereign immunity.

I

The parties bring to us a procedural quagmire marked by a profound lack of clarity--at times approaching confusion--in their litigation before the Navajo Nation district court and their pleadings before the federal district court below. That pattern continues here.

Rather than including a complete statement of relevant facts as required by Fed. R. App. P. 28, appellants' opening brief incorporates facts as stated in a Navajo Nation judicial record. Appellants fail to comply with Fed. R. App. P. 30(a)(1)(B), which requires the filing of an appendix to the briefs including "relevant portions of the pleadings." This being an appeal from a Fed. R. Civ. P. 12(b)(6) [*3] dismissal for the complaint's failure to state a claim upon which relief may be granted, Rule 30(a)(1)(B) requires, at a minimum, inclusion in the appendix of the complaint at issue. *See* 10th Cir. R. 30.1(A)(1) (stating that the appendix to the briefs must

be "sufficient for considering and deciding the issues on appeal"). Were it not for *appellees'* submission of the complaint, we would be inclined to affirm the district court's dismissal on this basis alone. *See* 10th Cir. R. 30.1(A)(3) (stating that this court is not obliged to "remedy any failure of counsel to provide an adequate appendix").

As best as we can tell, the facts are as follows.

A

Montezuma Creek Clinic is located within the boundaries of the Navajo Nation and was, during relevant times, operated by the San Juan Health Service District ("Health District")--a special service district organized by San Juan County, Utah ("County")--under contract with the federal Indian Health Service ("IHS") to provide health care to members of the Navajo community. The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund.

In April 1999, Fred [*4] Riggs, Donna Singer, and Alison Dickson, all of whom were employed at the clinic, sued the Health District and County, among others, n1 in Navajo Nation district court for, among other things, alleged violations of the Navajo Preference in Employment Act ("NPEA"), Nation Code tit. 15, §§ 601-609. n2 The NPEA, which was enacted by the Navajo Nation, requires employers to "give preference in employment to Navajos," *id.* § 604(A)(1), and to file with the Office of Navajo Labor Relations a written affirmative-action plan, § 604(A)(2).

In pretrial proceedings, the Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary injunction in their favor. The Navajo court was troubled by what it perceived as a sharp drop in visits to the clinic by diabetic patients. In the court's view, "The reason these patients have not been coming in for life critical [*6] medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention." (1 Appellants' App. at 77.) Under the preliminary injunction, the County and Health District were required to reinstate Singer and Riggs to their prior positions at the clinic; to give Dickson full-time employment status; to compensate Singer, Riggs, and Dickson for their lost income; to expunge Singer's and Riggs's personnel files; and to pay attorney's fees. Moreover, the Navajo court prohibited the County and Health District from:

Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and, Interfering with the laboratory services to the Montezuma Creek Clinic; and, Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and immediate payment of all current and past due billings; and, Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; [*7] and Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic . . . .(1 *id.* at 85-86.) n3

In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in "repeated misrepresentations of fact and law," had engaged in evidence spoliation, had intimidated and tampered with witnesses, [*8] had obstructed testimony, and had engaged in the sandbagging of evidence. (1 *id.* at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them "to a trial by tabloid." (1 *id.* at 81.) Seizing on these conclusions, Riggs, Singer, and Dickson modified their complaint to add as defendants the clinic's insurer, Truck Insurance Exchange ("Truck Insurance"), and its attorney, R. Dennis Ickes. On May 3, 2000, the Navajo court took the extraordinary step of holding that Truck Insurance and Ickes should be bound by the preliminary injunction. The court also granted Riggs, Singer, and Dickson leave to seek enforcement of the preliminary injunction in state or federal court "pursuant to principles of comity and applicable law." (1 *id.* at 106.)

B

Riggs, Singer, Dickson, and twelve other individuals filed a complaint in United States district court against (1) the County, Health District, and a number of County and Health District officials ("County and Health District defendants"); (2) Truck Insurance; and (3) Ickes. The complaint listed various causes of action: discrimination and denial of equal protection; denial [*9] of free speech and association; denial of due process; antitrust and racketeering violations; fraud, conversion, and theft; and invasion of privacy and

defamation. Their complaint also sought enforcement of the Navajo court preliminary injunction and "a declaratory judgment that the Preliminary Injunction Order designed to protect the welfare of the Navajo Nation was issued within the sound jurisdiction of the Navajo Nation District Court and is authoritative over the defendants and the political subdivision" (Health District's Supplemental App. ("H.D. App.") at 46). The complaint asserted: "Pursuant to *Strate v. A-1 Contractor*, 117 S. Ct. 1404, (1997) [the] Navajo Nation District Court . . . has the right to protect the Navajo Patients' health and welfare, contractual rights of the Navajo people, and the civil rights of all those who are within the Navajo Nation boundaries and seek [the] Court's assistance." (H.D. App. at 48.)

Ruling on a motion to dismiss, the district court held that County and Health District defendants were entitled to sovereign immunity in the Navajo court. Reasoned the district court:

Tribal courts historically did not possess and [*10] therefore have not retained sovereign powers over states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. . . . Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.(2 Appellants' App. at 185.) In a separate decision, the district court dismissed plaintiffs' claim as against Truck Insurance and Ickes. Applying *Montana v. United States*, the district court held that the Navajo court lacked subject-matter jurisdiction over them.

Appellants seek review of the district court decisions. n4

[*11] C

We review the district court's dismissal of appellants' claims under Rule 12(b)(6) for failure to state a claim de novo. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999). At this stage of the litigation, we accept all well-pleaded allegations in the complaint as true and will sustain the district court's Rule 12(b)(6) dismissal only if it is clear beyond doubt that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Id.* Our role in this context "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Id.* (quotation omitted). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Op. 2d 474 (1974), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

In deciding a Rule 12(b)(6) motion, a federal court generally [*12] "should not look beyond the confines of the complaint itself." Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 960 (10th Cir. 2001), *cert. granted*, 122 S. Ct. 1171 (2002). There are two exceptions to this rule. First, the district court may consider "mere argument" contained in the parties' memoranda concerning a motion to dismiss. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454,

457 (10th Cir. 1978). Second, "it is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." Howsam, 261 F.3d at 961 (quotation omitted).

As stated above, appellants' failure to submit a copy of their complaint to this court on appeal is rendered less harmful by appellees' submission of that crucial document. However, the district court docket entries indicate that appellants filed attachments and an addendum to their complaint on July 26, 2000. We are at a loss as to the contents [*13] of these filings. Although it seems clear that the district court relied on facts beyond those alleged in the body of the complaint, there is no way to know from the record before us whether these factual allegations are reflected in the attachments to the complaint. Because appellants do not challenge the district court's decisions on grounds that the court exceeded the proper scope of Rule 12(b)(6) review, we defer to the district court's statements of factual allegations.

II

We first consider whether the district court properly dismissed appellants' claims against Truck Insurance and Ickes.

A

Long before the arrival of Europeans on this continent, tribes were self-governing political communities. Nat'l

Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). As such, the tribes possessed the full attributes of sovereignty, which included "the inherent power to prescribe laws for their members and to punish infractions of those laws." United States v. Wheeler, 435 U.S. 313, 323, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978). Although "their incorporation within the territory of the United States, [*14] and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised," *id.*, this divestiture was not absolute. Today, tribes retain sovereignty of a

unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.*Id.*

As Felix Cohen observed in his seminal work on the subject of federal Indian law, "Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1941); *see* Wheeler, 435 U.S. at 322. Contrary to County defendants' assertion on appeal (*see* County Appellees' Br. at 20), tribes are not subordinate to the states, *see* Washington v. Confederated Tribes, 447 U.S. 134, 154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), [*15] and certainly not to counties. n5

The leading case defining the scope of tribal inherent civil authority is *Montana v. United States. Montana* articulates the general rule that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. But there may be cases in which inherent civil authority will extend to the conduct of non-Indians [*16] on reservations. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

In a pair of subsequent cases, the Supreme Court applied *Montana* to address the scope of inherent civil *adjudicative* authority as well, holding that "as to nonmembers . . ., a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 137 L. Ed. 2d 661, 117 S. Ct. 1404(1997); Nevada v. Hicks, 533 U.S. 353, 357-58, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001). In *Hicks*, the Court acknowledged that this "formulation leaves open the question whether a tribe's adjudicative jurisdiction

over nonmember defendants *equals* its legislative [*17] jurisdiction." 533 U.S. at 358.

B

In evaluating appellants' declaratory judgment claim against Truck Insurance, the district court stated that in April 1999,

there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District . . . . Consequently, Truck retained Mr. Ickes to represent the District and related defendants . . . in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.(2 Appellants' App. at 198.) In their opening brief, appellants neither take issue with the district court's statement of these allegations nor contend that Truck Insurance is a member of the Navajo Nation such that *Montana*'s presumption against tribal authority would not apply. Rather, they contend that Truck Insurance falls within *Montana*'s consensual relationship [*18] exception. According to appellants,

Truck's contract for liability insurance was an inherent aspect attaching to each Navajo patient's contract for services with the clinic. But for the Navajo patients, Truck would not have had a contract with the defendants for the clinic. Truck's contract was an

inherent aspect of Attorney Ickes' representation of the defendants. Attorney Ickes kept Truck informed.(Appellants' Br. at 28.)

We reject appellants' argument. Under *Montana*'s consensual relationship exception, the relationship must be one between the nonmember and "*the tribe or its members*." 450 U.S. at 564. Here, Truck Insurance's contractual relationship was with the *clinic*, another nonmember. Thus, the Navajo Nation's exertion of authority over Truck Insurance is too attenuated to fall under *Montana*'s consensual relationship exception. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656, 149 L. Ed. 2d 889, 121 S. Ct. 1825 (2001) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

We also reject appellants' [*19] contention that their declaratory judgment claim against Ickes, who is not a member of the Navajo Nation, was improperly dismissed. Appellants claim that the Navajo Nation may regulate Ickes's activity because he entered into a consensual relationship with the tribe--i.e., he became a member of the Navajo Nation Bar Association. We agree that Ickes's membership in the Navajo Nation Bar Association and his practice before the Navajo district court constitute a consensual relationship with the Navajo Nation. However, our *Montana* inquiry does not end with this determination. As was the case with respect to Truck Insurance, the requisite nexus between the consensual relationship and the exertion of tribal authority is missing.

By enrolling as a member of the Navajo Nation Bar

Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction . . . ." In our judgment, the power to discipline an attorney for alleged misconduct in court [*20] is distinct from the power to join the attorney as a defendant with the clients he is representing before that court. n6 As the Supreme Court observed in *Atkinson*, the rule is not "in for a penny, in for a Pound." 532 U.S. at 656 (quotation omitted).

We are also unpersuaded that *Montana*'s self-government exception should apply with respect to Ickes. This exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." 532 U.S. at 658-59 (quotations omitted). Surely, the Navajo Nation's interest in regulating attorney conduct [*21] is great. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). But it is a long leap, and one we are unwilling to take, to suggest that the action taken by the Navajo court in this case was necessary to protect Navajo self-government or control its internal relations. If warranted, the Navajo Nation may protect its political integrity through other means, such as "the imposition of disbarment, suspension or reprimand of the offending attorney[]." Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118, 123 (N.M. 1988).

C

Appellants contend that the Navajo court's actions respecting Ickes are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit. Section 1302 is an express *divestiture* of tribal authority, providing, among other things, that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(7); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) [*22] (stating that in § 1302, "Congress acted to . . . impose certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment").

D

In contrast to their claim seeking a declaratory judgment, appellants' claim for enforcement of the Navajo court's preliminary injunction with respect to Truck Insurance and Ickes raises important questions concerning the proper role of federal courts. n7 Although a tribal court *defendant* may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851, 852, this right to be free from tribal court interference does not necessarily support a federal claim seeking enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," Wheeler, 435 U.S. at 323, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either.

Rather, they are sovereign [*23] political entities possessed of sovereign authority not derived from the United States, which they predate." NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). To the extent appellants' complaint anticipates a defense arising under federal law, it runs up against the well-pleaded complaint rule. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908).

Appellants nonetheless seek enforcement of the Navajo court injunction [*24] under Full Faith and Credit Clause of the Constitution or, in the alternative, comity principles. Under the Full Faith and Credit Clause,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. *Compare* United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, 15 L. Ed. 299 (1855) (holding that the Cherokee Nation was [*25] a "territory" for

purposes of a federal letters of administration law), *with* New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474-75, 53 L. Ed. 286, 29 S. Ct. 190 (1909) (citing, with approval, Ex Parte Morgan, 20 F. 298, 305 (W.D. Ark. 1883), which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). *See generally* Wilson v. Marchington, 127 F.3d 805, 808-09 (9th Cir. 1997) (discussing the issue at length and ultimately holding that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 is applicable to tribal judgments). We need not address this issue because appellants admit that they

did not argue full faith and credit in the Federal [district] Court, but upon further consideration of the full pervasiveness of the United States in Tribal Court systems, and given the need for preliminary injunctions in health and public safety emergencies, the Plaintiffs now argue full faith and credit is appropriate for exclusively tribal claims under the facts of this case.(Appellants' Br. at 36 n.14.) As a general rule, this court will not [*26] consider an issue on appeal that was not pressed below, Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992), and we choose not to do so today. We thus proceed with the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity.

We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851; *see* Wilson, 127 F.3d at 810 (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did

not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law"). Therefore, given our earlier conclusion that the Navajo court lacked subject-matter jurisdiction over Truck Insurance and Ickes, we must affirm the district court's dismissal of appellants' enforcement claim as against those parties.

III

We proceed to review the district court's dismissal of appellants' claims against County and Health District defendants.

[*27] A

In its memorandum decision and order, the district court ruled that the Navajo court suit against County and Health District defendants was barred by the doctrine of sovereign immunity. The Navajo court's exercise of jurisdiction over these defendants was, in the district court's view, "nonsensical" and "ludicrous." (2 Appellants' App. at 190.) The district court based its decision on constitutional sovereign-immunity principles, stressing that the Constitution never would have been ratified had the states been stripped of their sovereign authority "'except as expressly provided by the Constitution itself.'" (2 id. at 185 (quoting Alden v. Maine, 527 U.S. 706, 727, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)).) As exemplified by such decisions as *Alden* and Hans v. Louisiana, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), the federal doctrine of sovereign immunity holds that the federal government may not, as a general matter, infringe the states' immunity from private suit.

Appellants contend that the district court's analysis of their claims against County and Health District defendants should have proceeded under *Montana* and [*28] subsequent cases defining tribal inherent sovereignty. Had these principles been applied, say appellants, dismissal would have been improper.

B

We begin our analysis with the acknowledgment that federal sovereign immunity and *Montana* are distinct legal doctrines. On a practical level, however, both *Montana* and sovereign immunity may potentially divest the Navajo court of the power to adjudicate the parties' suit. n8

[*29] The district court's reliance on federal sovereign immunity misunderstands the doctrine as defined by the Supreme Court. *See* Nevada v. Hicks, 533 U.S. 353, 373-74, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001); Nevada v. Hall, 440 U.S. 410, 414, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979) ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."). Nonetheless, at this point in the analysis it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*.

C

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health

District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Our judgment is guided by Nevada v. Hicks, 533 U.S. 353, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001) [*30] decided by the Supreme Court after the district court's dismissal in the present case. The primary issue in *Hicks* was whether a tribal court possessed "jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime." Id. at 357. The Court concluded that the tribal court did not have jurisdiction, applying the two *Montana* principles of Indian law that we have already discussed: first, that "'as to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" id. at 357-58 (quoting *Strate*, 520 U.S. at 453); and second, that "where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,'" 533 U.S. at 359 (quoting Montana, 450 U.S. at 564) (emphasis removed). Although the Court did not answer the question of whether a tribe's adjudicative jurisdiction over nonmembers equals its regulatory [*31] jurisdiction, the Court made clear that without regulatory jurisdiction under *Montana*, a tribe is definitively without adjudicative jurisdiction. 533 U.S. at 358.

Hicks expressly acknowledges that *Montana* and

sovereign immunity are distinct doctrines. Moreover, *Hicks* rejects the view that "immunity defenses should be considered in reviewing tribal court jurisdiction," 533 U.S. at 373 (quotation omitted), and provides two reasons for this conclusion:

The first is that it is not true. There is no authority whatever for the proposition that absolute-and qualified-immunity defenses pertain to the court's jurisdiction--much less to the tribe's *regulatory* jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. *Cf. Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 267, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997)). And the second problem is, that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider. 533 U.S at 373-74 (parallel citations omitted). [*32] *Hicks* thus stands for the proposition that *Montana* analysis should proceed before considering immunity defenses. n9 In sum, we conclude that the district court should have performed a *Montana* analysis before reaching the sovereign immunity question.

D

Although the district court did not conduct a proper analysis under *Montana*, we are nonetheless free to affirm the district court's dismissal on any grounds for which there is a record sufficient to permit conclusions of law, provided the litigants have had a fair opportunity to develop the record. *See* Seibert v. Oklahoma ex rel. Univ. of Okla. Health Scis. Ctr., 867

F.2d 591, 597 (10th Cir. 1989). [*33] We decline to do so, however, and instead vacate the court's dismissal of appellants' claim against County and Health District defendants, and remand the matter for further proceedings. In addition to the fact that County and Health District defendants did not brief the *Montana* issues on appeal, n10 we have kept in mind the limited nature of our inquiry when assessing Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted. "The granting of a motion to dismiss must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Pelt v. Utah, 104 F.3d 1534, 1540 (10th Cir. 1996) (quotation omitted).

[*34] Appellants' position has been that the district court relied on the wrong doctrine in dismissing its claims against County and Health District defendants. We do not intend to suggest an outcome on remand. However, as the Supreme Court has observed, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Nat'l Farmers, 471 U.S. at 855-56 (footnote omitted).

IV

The district court's dismissal of appellants' claim against Ickes and Truck Insurance is **AFFIRMED**. Dismissal of appellants' claim against County and Health District defendants is **VACATED**, and the matter is **REMANDED** for further proceedings

consistent with this opinion. All outstanding motions are **DENIED**.

Footnotes

1Sued in the Navajo court action were the Health District; chairman of the district governance board Roger Atcitty; former governance board member John Lewis; governance board members Karen Adams and Patsy Shumway; and district director of patient care Laurie Shafer. (*See* 2 Appellants' App. at 176 n.5.) Also sued were San Juan County, Utah; county commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; county attorney Craig Halls; and county administrator Richard Bailey. (*See* 2 id. at 176 n.4.) Except for Shumway and Maryboy, who were sued in their official capacities only, the individual defendants were sued in both their official and personal capacities. [*5]

2Appellants' claim that "they brought only Navajo law claims before the Navajo tribunal" is incorrect. (*See* Health District Appellees' App. at 247 (Navajo court complaint) (setting forth a claim entitled "The Right to Free Speech as Protected by the Navajo Nation, the United Nations, and the United States"); *id.* at 248 ("Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States."); *id.* at 249 ("The right to Due Process protected by the Navajo Nation, United Nations, and the United States."); *id.* at 255 ("The Right of Equal Protection Specifically Protected by the Navajo Nation, the United Nations, [and] the United States.").

3The Navajo court also held "that in the event that the defendants fail to obey the Order of this Court, commencing the [fourth] day of March, 2000, the defendants shall be fined at the rate of $ 10,000.00 . . . per day, for each and every day the Order of this Court is not carried out in its entirety." (1 Appellants' App. at 104.) Moreover, the court ordered "that each and every personal defendant and defendants [*sic*] counsel will pay $ 1000 per day of the $ 10,000 daily fine beginning March 2, 2000, [*sic*] from their own personal assets." (*Id.*)

4The district court did not act on appellants' other claims, and consequently, this court originally lacked jurisdiction over this appeal. Title 28 U.S.C. § 1291 grants the courts of appeal "jurisdiction of appeals from all final decisions of the district courts of the United States." Ordinarily, an appealable final judgment is one that terminates "all matters as to all parties and causes of action." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1444 (10th Cir. 1984) (en banc).

While this matter was pending, however, the district court exercised its discretion under Fed. R. Civ. P. 54(b) to direct entry of final judgment on plaintiffs' Navajo preliminary injunction claim. As a result, this court now has jurisdiction over this appeal under § 1291. *See* Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 583-84, 63 L. Ed. 2d 36, 100 S. Ct. 800 (1980)

5We must reject County appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States *Constitution* came into being and that there has been nothing post

Constitution to change that fact" (County appellees' Br. at 20).

6*See* Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118, 122 (N.M. 1988) (collecting cases, and stating that "an attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client").

7Because we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well. *See* Fed. R. Civ. P. 57; 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2767, at 650 (3d ed. 1998). We do not consider, nor do we decide, whether such relief is available at this interlocutory stage of the parties' tribal court litigation.

8We note that County and Health District defendants do *not* assert sovereign immunity from suit in federal court. *Cf.* Lincoln County v. Luning, 133 U.S. 529, 530, 33 L. Ed. 766, 10 S. Ct. 363 (1890) (holding that Eleventh Amendment immunity does not extend to counties, cities, or municipal corporations); *cf. also* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) (holding that Eleventh Amendment immunity does not extend to local school districts). Moreover, it must be remembered that the County and Health

District asserted their sovereign immunity defense in *Navajo court*. We sit in review of that judgment.

9In another telling passage, the Court in *Hicks* stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of *Montana* analysis." 533 U.S. at 373.

10(*Cf.* County Appellees' Br. at 3 ("Because the District Court never ruled on the issue of subject matter jurisdiction with respect to San Juan County Appellees, it would be inappropriate for this Court to address that issue on this limited appeal."); Health District Appellees' Br. at 3 (stating that the sole issue on appeal was "whether the district court erred in dismissing plaintiffs' claim seeking enforcement of the tribal court orders as against the Health District defendants on the grounds that the Health District defendants are immune from suit in the tribal court under the doctrine of sovereign immunity").)

SR-CV-162-99-CV
IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER; Fred Riggs C#18570;
Alison Dickson C#212,765;
Plaintiffs,
v.
SAN JUAN COUNTY; San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway, and other John and Jane Does as yet unnamed in their personal and official capabilities.
Defendants.

FINDINGS, OPINION AND JUDGMENT AT PRELIMINARY INJUNCTION

THE COURT, having jurisdiction over these parties and proceedings made out on a territorial premise, that is, the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation, and for further cause that two of the three plaintiffs are members of the Navajo Tribe of Indians, the third is married to enrolled member, and they ALL have significant contact with the Navajo Nation, as does the clinic itself as a major health care provider to the Navajo and other local Native Americans who look to this Court for justice. Such contentions of jurisdiction are well founded by way of Montana v. United States, 450 U.S. 544 (1981) and the

exception found in Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al, v. A-1 Contractors, U. S. Supreme Court, April 23, 1997, notwithstanding 7 NNC 253(B), and therefore, having now before it the above styled proceedings ripe for decision in the matter of the application of the plaintiffs for a preliminary injunction pursuant to Rule 65(c) of the Navajo Nation Rules of Civil Procedures, pending trial in chief in the matter of the initial complaint drawn by the plaintiffs against the defendants raising issues of:
denial of due process;
denial of equal protection;
denial of free speech and assembly;
defamation;
theft;
conspiracy;
and interference with the public policies of the Navajo Nation.
Despite the contentions of the defendants, the Court specifically finds all these claims raise issues clearly extending well beyond the mere loss of income or loss of a job, directly into the wellbeing of the plaintiffs and Navajo Nation citizens and as argued by the plaintiffs, go to the soul of a person and their inalienable rights that exceeds monetary value.

Likewise the plaintiffs also raise claims that the Native American, and in particular, Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed by the San Juan Health Services District conduct, by way of:
stopping emergency and routine ambulance and EMT service;
stopping laboratory services; and

billing of INS patients creating the chilling result of effectively turning many patients, including diabetic patients, away from the Montezuma Creek Clinic for fear of their inability to pay for their care.

For raising such claims, the plaintiffs, as well as plaintiffs counsels, were labeled 'bold faced liars' by the defendants and likewise, San Juan Health Services District has totally disregarded the Navajo Nation's chapters' resolutions and the concerns for the Navajo patients' well being.

On initial application the Court issued a temporary restraining order on behalf of the plaintiffs in prelude to the proceedings in chief on injunctive relief. The TRO was dismissed on the motion of the defendants and the proceedings on the preliminary injunction commenced thereafter on testimony. **Testimony was taken in sequential setting with written closing arguments received by the court on the 6th of December, 1999**. With the plaintiffs represented by Wm. P. Battles, Esq. of the firm of Wm. P. Battles and Associates of Window Rock, Navajo Nation, and Susan Schildmeyer, Esq., and the defendants by Dennis Ickes, Esq., all testimony and arguments are now fully before the Court, and well considered in their total, the Court draws attention to the issues of injunctive relief as found at Rule 65(c) of the Rules of Civil Procedure, stating:

That the moving parties, the plaintiffs herein, must demonstrate to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; and,

That the plaintiffs then must further demonstrate that they are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; and,

That the likely injury, loss, or damage to the plaintiffs are substantial in nature and character; and finally, **That the plaintiffs do not have an otherwise available and adequate remedy at law.**

The Court is mindful that the issuance of injunctive relief is clearly within the sound discretion of the trial court. Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 858, 866 (10th Cir. 1982).

Accordingly, the Court makes the following findings based on the testimony before it:

That as to the matter of plaintiff Fred Riggs:

That Mr. Riggs is a Physicians Assistant and a permanent regular employee of the San Juan Health Services District at the Montezuma Creek Clinic; and, on or about the 11th day of November, 1998, Mr. Riggs was RIF and rehired with a $10,000.00 pay cut; was made to start using a time card; and lost three years of raises, including his raise for being a Navajo-English interpreter; and, That the RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Riggs; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant; and, Prior to November of 1998 Mr. Riggs had 30 years of unblemished employment as a Physicians Assistant, and had not prior to November 1998 ever been required to have hourly time keeping responsibilities; and, That in the second week of November, 1998, or thereabouts, on Mr. Riggs first ever time card, Mr. Riggs accidentally represented 8.4 hours as a day and a half or 12 hours; and, That as a result of this time card mistake Mr. Riggs was disciplined from the 2nd day of December, 1998 to the 8th day of December 1998 by:

Being placed on administrative leave, and being told that he could not speak or associate with other clinic employees; and, being charged with fraud, in writing, and the same being placed in his personnel file as a disciplinary measure; and, Being placed on probation for the term of 30 days, creating fear from the loss of his employment; and, given further warnings that he may be terminated for repeating such time card errors; and,

That Mr. Riggs never received any warning letters; any time card instruction;

nor any time to correct any alleged deficiencies, either prior to this November RIF, or the aforestated discipline or probation; and, That within less than 10 (ten) days of being charged with fraud and being placed on administrative leave, and subsequently probation, Mr. Riggs was offered a promotion to fill the position made vacant by Ms. Singers termination, as manager of the Montezuma Creek Clinic; and,

That Mr. Riggs grieved his discipline as being discriminatory in a letter to Mr. Wood, and Mr. Wood nearly immediately withdrew the offered promotion because Mr. Riggs had accused him of discrimination; and,

That the personnel policies and procedure of the San Juan Health Services District prohibit punishment of employees who make discrimination grievances such as Mr. Riggs had done; and,

That Mr. Riggs has specialized medical training and has not been on hourly time card keeping requirements in the 30 years or so prior to November of 1998, and that as a bona fide professional, is exempt from time card keeping requirements; and,

That Mr. Reid Wood stated that time cards were a problem throughout the San Juan Health Service

Districts payroll activities and had to be stopped; and,
That after Mr. Riggs grievance hearing he was placed on an additional 30 days probation without justification; and,
That Rick Bailey found Reid Wood had falsely informed Bailey of the breadth of discipline meted out to Riggs, and Wood was never disciplined for telling his superior a falsehood; and,
That the spread sheet analysis of Bryan Bolander, and the time cards submitted to the Court show similar and multiple errors on the time cards throughout the San Juan Health Services District; and,
That particular time cards showed, for example, that even in the first week of November, 1998, just one week prior to Mr. Riggs being disciplined, Reid Woods time card had ink; cross outs; and write ins, errors for Which others, notably the plaintiffs, were disciplined, however Reid Woods was not similarly disciplined for his time cards errors; and,
That a second example is the time cards of Bruce Bryant a caucasian physician assistant, had time cards showing he was not required to punch in or out, either before or after the November, 1998, RIF; and,
That a third noted example are the time cards of Mary Nielson, again showing ink; cross outs; and white outs, while Mr. Riggs and Ms. Singer were being severely disciplined for like infractions, no discipline was taken in respect to Ms. Nielson; and,
The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to his employment;

no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District and,
The defendants did not offer any evidence that the defendants had not administratively conspired to continue to use Mr. Riggs reputation and case as a means of arbitrarily; capriciously, and abusively making an example of what happens to people who take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and,

Testimony of Ms. Singer:
Ms. Singer was a permanent employee and manager of the Montezuma Creek Clinic; and,
Mrs. Singer had previously helped set up and manage the Blanding Urgent Care Center, and the Blanding Birthing Center; and,
That Ms. Singers career started as an x-ray technician working up to being the manager of three different health care clinics; and, that for some of Ms. Singers career as a clinic manager she did not have to punch in and out on time cards; and,
That the San Juan Health Services District recognized managers as FSLA exempt as a matter of policy; and,
Ms. Singer had three job assignments with the San Juan Health Services District (1) as an x-ray technician; (2) an Ultrasound technician; and (3) the Manager of the Montezuma Creek Clinic; and,
That Ms. Singer worked approximately 3000 hours off the clock without being paid overtime; and,

That Ms. Singer had a great deal of latitude in making management decisions since Montezuma Creek Clinic was so far from the Monticello, Utah, headquarters of the San Juan Health Services District and the District administrators seldom visited the Montezuma Creek Clinic; and,

That on the 13th day of November, 1998, Ms. Singer was unaware of another persons clocking in on her Montezuma Creek Clinic time card when she was in Blanding; Utah; and,

That Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question and,

That the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Ms. Singer admitted to having made the time card error;

and,

That Ms. Singer was charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated; and, That Ms. Singer was not previously aware that Rick Bailey was the instigator of her termination until she received the Answer of the 14th of May, 1999, and suspected from the information therein provided that Mr. Bailey had authorized her termination; and,

That **Rick Bailey testified that he felt uncomfortable being Ms. Singers grievance hearing officer because he had actually participated in the decision to terminate Ms. Singer, and he testified further that he relied on Craig Halls' advice to proceed as her grievance hearing officer** anyway in spite of Utah Supreme Court law to the contrary and further Mr. Bailey and Mr. Wood concealed this information from Ms. Singer, and,

That Ms. Singers **future in public health and in her small community where she resides has been harmed due to the adverse publicity of the malicious and unfounded fraud charges against her**, Monument Valley Clinic, also within the San Juan Health Services District, was not
obliged to punch in and out on time cards; and,
That Mr. Bolander testified that as per his spread sheet analysis the number and types of errors commonly found by him to exist in the San Juan Health Services District that if everyone time cards were multiplied by three places of work and had to have documented time they would probably all look the same as Ms. Singer and Beverly Harris cards; and,
That as per Mr. Bolander's testimony, Beverly Harris time cards are worse than Singers and Ms. Harris was never disciplined; charged with fraud; or terminated; and,
That according to the further testimony of Ora Lee Black, Caucasian, she testified that she had herself personally called into work to have someone clock in for her on numerous times, so numerous that Ms. Black when questioned could not recall how many times, and that to Ms. Black further knowledge that other nurses in Blanding, Utah, did likewise as a common practice, without being disciplined; charged with fraud; or terminated; and,
The defendants offered absolutely no credible no evidence of the San Juan Health Services District affording any evidence of Ms. Singer receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment no evidence of any consideration of the Navajo Preference in

Employment Act in its actions towards Ms. Singer; and

no evidence that the San Juan Health Services District had not intentionally used the reputation of Ms. Singer without her permission essentially to stop the time card problems throughout the San Juan Health Services District nor did the defendants offer any evidence that the defendants had not administratively conspired to continue to use Ms. Singers reputation and case as a means of arbitrarily; capriciously, and abusively making an example, even as to trial by the media of what happens to people who stand up for their rights and take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and take any position in opposition to the San Juan Health Services District or the defendants themselves; and,

That as to the matter of Allison Dickson status of employment:

That Mr. Dickson started working for the San Juan Health Services District as a full time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status; and,

That Mr. Dickson time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired; and,

That the policies and procedures of the San Juan Health Services District states that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San Juan Health Services; and,

That the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th day of December, 1998, that he be given regular

employment status; and, That Mr. Dickson signed an affidavit attesting to the highly racially inflammatory and insensitive comment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with "dog tags"; and,

That the time cards entered into evidence demonstrates the current Montezuma Creek Clinic manager's nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority; and,

That finally, the records of the San Juan Health Services District show that there is no other employee of the San Juan Health Services District with Mr. Dickson's time in service measure by regular work hours that is not a regular permanent employee with benefits of regular status employment.

Defendants' Evidence is completely Admitted Commensurate with Navajo Nation Customs and Traditions that highly value fairness and everyone having their say, the Court allowed into the record all of the defendants' exhibits as follows:

All of Ms. Singer's time cards and payroll records, and the time cards of all other persons in the employ of the San Juan Health Services District, and a spreadsheet drafted by CPA Bolander explaining the patterns of mistakes and errors were admitted on behalf of the defendants.

a. The time cards show that errors were rampant throughout the San Juan Health Services District system and were not at all limited to just the time cards of the plaintiffs Mr. Riggs and Ms. Singer; and,

That three of the time cards of Ms. Singer were never given to either Singer at the time of her termination, nor used in any evaluation of Ms. Singers termination,

nor provided to the counsels for the plaintiff despite appropriate discovery being timely requested; and,

b. That on the **hearing of the 14th day of May, 1999,** Mr. Bolander testified that the three time cards shown to him were not part of the cards he was previously provided with to examine either by the San Juan Health Services District or provided to plaintiffs counsels; and

A letter from Lauren Shafer critical of Ms. Singer was likewise accepted, and notably had a "check mark" in the upper right corner signifying it was not kept in Singer's ordinary personnel file, but a secret file in the CEO's office.

a. Lauren Schafer, a chief administrator with the San Juan Health Services District never rebutted in her testimony where the letter was kept; and,

b. That despite the inflammatory nature of the letter it was never placed in Ms. Singer's appropriate personnel file, nor did the prior Chief Executive Officer apparently consider the letter when Ms. Singer was given regular merit pay raises and additional duties and expanding management responsibilities; and,

c. The Court accordingly views the letter with substantial lack of importance; and,

That Lauren Schafer testified that after a "scrupulous examination" of Singer's record for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer's

intent to commit fraud.

Ms. Singer testified that she never remembered doing anything to intentionally cheat the San Juan Health Services District or San Juan County out of anything; nor does any evidence presented otherwise indicate anything to the contrary; and,

Ms. Singer testified that she never remembered ever calling anyone to clock in for her on any occasion; nor does any credible evidence presented otherwise indicate anything to the contrary; and,

Contrary to the assertions of the defendants, Mr. Bolander testified that Ms. Singer's cards show that: Ms. Singer documented where she was at on a consistent basis; and,

That Mr. Bolander could find no evidence whatsoever of fraud; and,

That Mr. Bolander's spreadsheet analysis, along with a multitude of time cards in comparison, illustrated plainly that time card errors were and are a problem in the district, and not at all limited to only Mr. Riggs and Ms. Singer; and,

That the defendants have all failed to submit even one piece of evidence rebutting the expert testimony of Mr. Bolander, or his analysis, or his well-reasoned and documented findings which rely exclusively on the evidence which was in the possession of the defendants and tendered by the defendants to the Court as discussed in the foregoing.

LEGAL CONCLUSIONS AND FINDINGS

At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor-employment issue. **Closer examination and scrutiny of the testimony before the Court it is not nearly so simply the case herein, especially in light of the sworn testimony.** Discrimination never is obvious or simple. It is most commonly found in subtle subterfuge manifesting deceit and contempt for the human condition to which each of us are differently born, and for which, without

the benefit of those strong enough to come forward through the feigned veil of petty righteousness and resulting humiliation, it can only be endured in the silent pain of accepting disgrace and indifference. It is always a sad sad moment in the condition of mankind. No exception is found here. With minor adaptation from the arguments delivered to the Court, the Court has largely adopted the position of the plaintiffs to the legal reasoning of these proceedings.

Wherein the premise of the case before the Court is multi-faceted -framed in the original complaint, and now seeking parallel injunctive relief. Rule 65 of the Navajo Rules of Civil Procedure provides for the preservation and consequence of evidence and testimony, and further sets forth the legal basis for an injunction which lays in Navajo case law, and focuses to proving four criteria for an injunction.

Case Law

The case law of the Navajo Nation provides that an injunction is extraordinary relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. Gudac v. Marianto, 1 Nav. R. 385, Nav. App. Feb. 28, 1978. The United States Supreme Court has likewise found that while economic loss alone generally does not constitute irreparable injury, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found." Sampson v. Murray, 415 U.S. 61, 92 n. 68 (1974). Notably, and contrary to the contentions of the defendants, the factual circumstances of Sampson are well seen to be nearly wholly unlike the facts circumstances here, but as so stated.

Here, now having taken evidence and testimony, and on the examination of the Court, we have instead permanent employees or employees who qualify for regular employee status. Sampson involved a temporary employee with no vested interest in her employment. Sampson also had the availability of a completely impartial hearing panel. Here, it is noted from the testimony that such an impartial hearing panel was tainted in bias and deceit. The plaintiffs did not have the availability of such an impartial panel. Further, and unlike Sampson that concerned only employee matters, **these plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights which are protected by the Navajo Nation Bill of Rights, notwithstanding the 1968 Indian Civil Rights Act, and as well the San Juan Health Services District's endangerment of the Native American and Navajo public that SJHSD did commercially and voluntarily within their corporate powers contract to provide services to.**

As in the case of Halona v. Navajo Nation, 1 Nav. R. 189, the key to this case lies "not in non-Indian analysis." as to any **matter of standing**. Id. at 199. The fact that makes this case most distinguishable from Sampson in terms of the need for protection of the plaintiffs, is that the plaintiffs have a privilege and a duty **under Navajo custom and tradition for Mrs. Singer in her tribal in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizen".** In Halona, this Tribal status raises issues "peculiar to Navajo tradition and law." The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo's to other

Tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs and traditions.

Further, and while not controlling it is at least instructive, that the Tenth Circuit has established the following four criteria for a preliminary injunction, not dissimilar to the requirements at Navajo law:
The movant must establish that the injunction would not be adverse to public interest; and,
That the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and,
That the movant will suffer irreparable injury unless the injunction issues; and,
That there is a substantial likelihood that the movant will eventually prevail.
Accordingly:

The Preliminary injunction will not be Adverse to the Public Interest.

In this case, a preliminary injunction will insure the protection of overwhelming public interest by way of the **restoration and preservation of patients' welfare in the northeastern sector of the Navajo Nation; restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs**; customs; and economic levels; and eliminating nepotism and favoritism in employment; thereby improving adherence to the provisions, terms, and conditions of the **Navajo Preference in**

Employment Act and reducing the chilling effect on the people's rights as is so well evidenced here. The injunction will further support and sustain the local Chapters resolutions.

Patient Welfare

On November 9, 1999, the Court was given a letter from Nettie Pratt, the Montezuma Creek Clinic's diabetic clinician, indicating that there had been as much as a **250% drop in visits by diabetic patients alone to the Montezuma Creek Clinic**, and **many of those patients have now not been seen for three months or more**. The reason these patients have not been coming in for **life critical medical care** is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention. Even one more month without effective management and adhering to compliance in stopping the billing, may lead to death, or serious irreversible eye or kidney damage to the patients, or other complications for the diabetic patients. Likewise in a similar vein, Debbie Benally, an Emergency Medical Technician for the Montezuma Creek Clinic, testified that when the ambulances were "locked down", **Mrs. Singer**, and plaintiffs attorneys, were the only one who **cared, who called, and who tried to get something done about it despite the sneers and jeers of the defendants.**

Smooth Clinic Operations

Brenda Brown, the current manager of the Montezuma Creek Clinic testified on September 24, 1999, that on numerous occasions the administration has refused to give even her the financial reports for the clinic that would have enabled her to do her job or

otherwise effectively assist in the appropriate day to day management and operation of the Montezuma Creek Clinic especially in light of the now upcoming transition to local tribal control.

Limiting Nepotism

Nepotism, likewise contrary to the personnel policies and procedures of the San Juan Health Services District as per the testimony received, is rampant at Montezuma Creek Clinic in that, for example, the **manager is the sister of the Chairman of the Board**, and likewise San Juan Health Services District, also by testimony, employs the current managers aunt, cousin, and nephew all working at the same clinic **despite policy otherwise.**

NPEA Adherence

Testimony likewise reflected that **employment positions throughout the San Juan Health Services District have not been advertised either "in house" to existing San Juan Health Services District employees or in the Navajo Times or KTNN Radio as required by the Navajo Preference in Employment Act.** As a matter of the public policy of the Navajo Nation labor is regulated to a certain extent including the provisions of the Navajo Preference in Employment Act which compels a competitive process for employment which does not exclude Navajos, and other particular persons, and creates a qualified preference pool of Navajo labor whenever possible in that **economic development and employment of the surplus Navajo work force are of significant public**

interest to the Navajo Nation and applicable whenever possible.

Little or No Damage to The Opposing Party

The defendants have confessed at the hearing of these proceedings on the 9th of November, 1999, that the **Montezuma Creek Clinic will be removed from the control and supervision of the San Juan Health Services District beginning the 1st day of January, 2000, in part at least due to the impact of this litigation**. The defendants therefore argue that if the injunction issues now; it will only have effect for one month. The plaintiffs offer that even if for only a short time, that time is still crucial to the clinic's existence. The defendants can not complain of damage due to large sums of back pay if the defendants could have cut the time very short by telling the truth on May 14, 1999.

"Justice delayed is injustice" and "(N)o party can claim prejudice if the ability to prepare or raise claims was within his or her control, as here." Plummer v. Plummer, A-CV-30-89 at page 182.

Plaintiffs will Suffer Irreparable Injury if the Injunction Does Not Issue

If the injunction does not issue, people will consider the charges and actions against the plaintiffs to be true, and they will continue to suffer the irreparable harm to their names and reputations as attested to by the testimony of Pauline Oshley, George Jones and Debby Benally. **These witnesses testified as to the harm to the Clinic, and to the plaintiffs, in specificity; (a) stoppage of ambulance services; (b) interference with pharmaceutical services; (c) stoppage of lab services; (d) harm to the reputations of Mr. Riggs**

and Ms. Singer, (e) and violations of rights of association of the plaintiffs.

There will be a chilling effect upon the rights of all Navajo citizens in the work place if they do not believe there can be redress against their employers for rights violations in the workplace. San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native Americans that has continued for generations.

The harm has been irreparable. Ms. Singer testified that the scarcity of her personal resources, and the length of time the defendants have stalled these proceedings by obstructive tactics and false statements to the Court, has necessitated her to become separated from her husband in order for the family to financially survive. One can not quantify and compensate for the total disruption of a marriage and home done simply at the folly of her oppressors.

Mr. Riggs attested that his uncle, a veteran of the United States Armed Forces, died for these rights and freedoms for all Americans, and that can never be adequately compensated for by money or by the law. How does the Court or defendants compensate for the loss of rights bought with Navajo blood? It can't. Still, an injunction will begin the process of healing and the removal of the indignation of the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name. Pauline Oshley testified as to the "shabby" treatment the manager's family has been giving to her, and her small children. How is a young Brenda Brown, as Montezuma

Creek Clinic manager, supposed to give orders or reprimands to her elder Aunt, Dorothy Kay, and stay in keeping with Navajo tradition and the family interrelationship of "Ke"?

Likewise, the plaintiff's legal fees and costs continue to escalate rapidly. ***One way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and all expenses necessary for the plaintiffs to defend their rights as the Court will order herein.***

There is Substantial likelihood the Movants Will Succeed on the Merits

The plaintiffs stand more than an excellent prospect of success of prevailing on the merits in these proceeding given the presentation and testimony to date. Pursuant to the FSLA, the time cards are irrelevant as a reason for disciplining or terminating Ms. Singer and Mr. Riggs.

Even speaking in the opposite even if Singer's fraud charge (which has been found to be not true by this Court) were taken as possibly true, that does not excuse the denial of due process and equal protection as evidenced herein. Defendants have produced no well-founded or substantial evidence to rebut the plaintiffs claims of rights deprivation; and, **the defendants have placed at risk numerous patients by billing policies they are using to continue to turn away otherwise eligible Native Americans from vital medical and emergency care at the Montezuma Creek Clinic, in violation of IHS contracts and regulations û not to even mention elementary common human dignity for their fellow man.**

Patterns of Bad Faith Toward the Court

Bad faith conduct towards the Court and all the surrounding circumstances as are found to be true and appropriate in the sound discretion of this Court, can likewise be grounds for the plaintiffs to prevail. Herein, the Court sees as obvious the harm to the public and plaintiffs' rights and the waste of judicial processes in this Court by the plaintiffs repeated misrepresentations
of fact and law; spoliation of evidence; witness intimidation and tampering; obstructing testimony; sandbagging of evidence; and repeated and substantive violations of the Navajo Nation Rules of Civil Procedure.

Misrepresentation of facts and law in violation of NNRCP at Rule 11.

On May 14, 1999, Rule Violations. The defendants' have accumulated and advanced a substantial and impressive list of substantive rule violations under the Navajo Nation Rules of Civil Procedure which remain currently before the Court in various summary motions. The defendants, for example, plead fraud, without one piece of evidence as to Singer's intent to commit fraud, and without the specificity of pleadings as required by the Navajo Nation Rules of Civil Procedure at Rule 9. Despite this, local and international newspaper coverage published the ill-plead claim since it was in the May 14, 1999, 'Answer' of the defendants. The defendants have purposefully subjected Ms. Singer, Mr. Riggs; and Mr. Dickson, to a trial by tabloid.

All of the above enumerated actions of the defendants and defendants' counsel, have here

constituted a pattern of behavior that only magnifies and exemplifies past and continued deprivations of the plaintiffs' inalienable rights, be they tribal or federal in nature, and harm to Native American patients and community in the Montezuma Creek area of the Utah Strip. As like in Gudac, such actions demonstrate the arrogance of the defendants, their cultural insensitivity, and the contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

Damages such as deprivation of rights; discrimination; denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person's reputation are all deprivations that far exceed mere deprivation of money, or employment or embarrassment. These constitute "direct action.... potent with circumstances... irretrievable." Adams v. Vance, 570 F.2d 950, 953 (1978). No amount of money, no availability of any Order of the Court, can fully compensate the plaintiffs and the Native American population in the Montezuma Creek for these past and ongoing substantial and inestimable damages.

While not controlling in the Navajo Nation Court as a matter of law it is at least instructive that this Court look to our sister sovereign through its Tenth Circuit and see that when the United States of America finds that when the three requirements of injury, ongoing harm, and more potential harm to the plaintiffs outweighs the harm to the defendants, then the plaintiffs need "only show that they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation", Tri-State Generation and Transmission Association,

Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986).

Here, to date, facts show, that not only are three defendants called the plaintiffs 'bold faced liars' as to activities at the Clinic, injuries to the Native American patients of the Clinic, and misrepresented Sampson v. Murray, upon which the Court relied to discharge its TRO. If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have easily been simply replaced by the Preliminary Injunction on May 14, 1999, with no further deprivations to the plaintiffs of rights, time, money, embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

Spoliation of evidence

Evidence submitted with the time cards of the Districts time cards shows, Richard Bailey's time card, that was viewed by plaintiffs Counsel and Bryan Bolander, is missing. This card showed **Bailey represented he worked 80 hours with a hand written '80' on a card he signed when he was working full time for San Juan County as the County Administrator, and as well claimed full time employment in the same time period with the San Juan Health Services District**. Mr. Bailey was never disciplined for working in one place full time while he was employed full time at another and drawing full compensation from both positions at the same time.

Witness Intimidation

Debbie Benally testified she had never spoken with Mr. Wood prior to the day before her testimony, at which time **he warned her over the telephone in the evening hours just before her anticipated testimony, as he did Ms. Singer personally, "you need to remember who you work for"**.

Ora Lee Black in her testimony stated the reason she did not wish to testify on Singer's behalf, or submit her affidavit which she declared to be true in all respects. Ora Lee Black testified that she and the other nurses bad **been told "not to get involved" in the case by Reid Wood**, after submitting their affidavits in support of Ms. Singer in respect to her position as manager of the Montezuma Creek Clinic.

Surprise and Prejudicial Evidence.

Nearly all of the defendants' evidence was submitted to the Court, despite prior discovery applications as provided for in the Navajo Nation Rules of Civil Procedure, in the last hour or so of **a 19 hour hearing**, without notification or review by plaintiffs' counsel prior to its presentation in the **September 24, 1999**, hearing elements satisfied, but overwhelmingly, it is also the case that the fourth prong has been met.

The Navajo Preference in Employment Act defines the rights of employees in the work plate of the Navajo Nation.

The Navajo Preference in Employment Act has been violated by lack of clear warnings; lack of a fair hearing process; retaliation for grieving discriminatory acts;

and lack of willingness to eliminate the problems. If the Navajo Preference in Employment Act has been violated, it is presumptive that the Native American employee's rights have been violated and Navajo Nation public policy has been undermined and disregarded for naught.

Chilling Effect

Resultantly if injunction does not issue herein the public, Native American and non-Native American alike, **will believe erroneously that nothing can be done when the San Juan Health Services District or when any other entity; organization; group; or individual violates their rights, and such an assumption will have a chilling effect upon others who may wish to come forward with similar claims, and suppress such efforts to the detriment of all Native Americans and non-Native Americans alike.** Such is not the foundation of a free society, and shall not be commenced here.

Conclusion

The defendants have, compared:
Failed to show how a service district, a minor political subdivision, is an "arm of the state" with immunity under Alden, et al. v. Maine, ___U.S. , Docket No. N8436, when Alden exempts minor political subdivisions from immunity; and,
Failed to show how civil rights violations are given immunity when Alden v. Maine exempts those types of injuries from immunity, and Alden did not address Navajo civil rights as defined within Navajo custom and traditions; and,

Failed to show how a special service district not implementing a merit system within the Utah Special District Personnel Management Act as "is established" by the Utah legislature, can be an "arm of the state" if it is violating the laws of the State within which it seeks to obtain immunity; and,

Failed to show **how a minor political subdivisions limited governmental authority exceeds that of the entire Navajo Nation sovereignty**, particularly when the **injury sustained by the plaintiffs so specifically directly effects the health and welfare of the Navajo Nation chapters and their residents pursuant to the Montana exception** of Strait v. A-1 Contractors; and,

Failed to show how minor political subdivision of a State can benefit itself an the taxpayers of the district by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then **treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and HIS contract obligations, all with impunity**, and believe that the district is somehow now immune from claims injury; and further,

Failed to show, or raise any issue or defense, as to the transcription records of the proceedings herein being unavailable by their inaudibility, despite the order of the Court the 9th of November, 1999, to notify the Court of any problem, and therefore the Court finds that the parties have waived any such issue or defense thereto;

and,

Accordingly, as set forth fully in the foregoing, injunctive relief is overwhelmingly justified and shall issue immediately. It is clear and convincing to the Court that the plaintiffs have (1) demonstrated to the

Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; (2) that are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; (3) that the likely injury, loss or damage to the plaintiffs are substantial in nature and character; and (4) that the plaintiffs do not have an otherwise available and adequate remedy at law. **These protectable rights include denial of due process; denial of equal protection; denial of free speech and assembly; defamation; theft; conspiracy; and interference with the public policies of the Navajo Nation.**

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

That the defendants be and are hereby ordered to immediately reinstate Ms. Singer and Mr. Riggs to their previous positions of employment as was occurring on the 1st day of November, 1998; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of being eligible for such status; and,

That the defendants be and are hereby ordered to immediately pay all lost income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with a letter so stating the expungement to the plaintiffs and to this Court; and,

That the defendants be and are hereby ordered to not put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise; and,

That Ms. Singer be returned to her role and position as a technician for and on behalf of the San Juan Health Services District and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court and,

The Court orders a waiver of any security deposit due to (a) the limited financial circumstances of Ms. Singer, Mr. Dickson, and Mr. Riggs and (b) SJHSD's placing of
Montezuma Creek Clinic employees in jeopardy as the transition from state to local tribal management nears; and,

The Court order that the defendants be and are hereby prohibited from:

Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and,

Interfering with the laboratory services to the Montezuma Creek Clinic; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and

immediate payment of all current and past due billings; and,

Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; and,

Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic; and,

The Court further hereby Orders the defendants to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing such Native American patients that as an IHS patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic; and,

The Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

The proceedings in chief herein be and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining.

So Signed and Ordered this 28th day of December 1999, at 4:45 PM.
The Honorable Raymond A. Begaye
District Trial Judge of the Navajo Nation

SR-CV-162-99
IN THE DISTRICT COURT OF THE
NAVAJO NATION JUDICIAL DISTRICT
OF SHIPROCK, NEW MEXICO

DONNA SINGER; Fred Riggs C#1 8570;
Alison Dickson C#212,765;
Plaintiffs,
vs.
SAN JUAN COUNTY; San Juan Health Service District;
Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy1; John Lewis Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway2, and other John and Jane Does as yet unnamed in their personal and official capabilities,
Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE OR MODIFY THE PRELIMINARY INJUNCTION ORDER

THE COURT having received and reviewed (1) the defendants' "Motion to Dissolve or Modify Findings Opinion and Judgment at Preliminary Injunction" and (2) the plaintiffs' response to the same motion, hereby denies the defendants' motion, and makes the following findings of fact and conclusions of law, that will incorporate herein and add to the original Preliminary Injunction Order raised in issue, as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The defendants accuse the Court throughout their motion of the Court denying the defendants due

process of law in claiming the defendants were denied the services of an in courtroom certified court reporter.

Findings of Fact

The defendants requested by written motion that they be allowed to have a certified court reporter take oral transcription of the proceedings before the Court. The request was responded, in written response stipulating to the defendants motion. The Court granted the motion.

The defendants never presented any qualified reporters for consideration of the Court The Court is not responsible for what the defendants did not do. The defendants were never denied the opportunity to have a Court Reporter present in the Courtroom; were never denied the opportunity to make further motions concerning the said reporter in the numerous hearings between April 24 and November 9, 1999; and were never denied the opportunity to make a written motion at any time in the last nine months. The only restriction on the reporter was that any such reporter would be able to perform their reporting services for non-Navajo, as well as Navajo speaking witnesses, and that counsel for the defendants was advised to seek out the services of the federal interpreters office in Albuquerque, New Mexico, for a listing of qualified Navajo speaking reporters and it was likewise the case that the Court ordered the reporter to provide copies of the transcripts to both parties and this Court. The plaintiffs even concurred with the motion for the reporter. Likewise it was only the plaintiff Riggs, thus far, who was prejudiced by the lack of a qualified reporter inasmuch as Navajo (his first language) was his preferred language in portions of his testimony and he

was denied the use of his own language in deference to the defense.

Conclusion of Law

The defendants were not denied due process of law and were provided with every opportunity to be heard as required by Navajo common law; by Navajo statutory law; by Navajo Rules of Civil Procedure; by applicable US law by the Navajo Nation Bill of Rights, and by the 1968 Indian Civil Rights Act. The defendants submitted motions; two 'Answers' ; filed, responded to and argued motions; called witnesses; and even by the defendant own accord they invoked the jurisdiction of this Court on its own initiative by seeking the Court's authority and jurisdiction over its own counterclaims filed in this Court seeking its own independent damages as against the defendant Singer. **No Court rulings prohibited them from further participation in any form or fashion.** No Court order denied them the privilege of using a certified court reporter.

"[T]he fundamental requfrement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutionaiprotection is invoked" Anderson National Bank v. Luckett 321 U.S. 233. 246. This court cannot possibly understand why it would be responsible for securing a qualified court reporter on behalf of the defendants. Those duties and responsibilities fall squarely on the shoulders of the defendants and their counsel the defendants requested the reporter -**the defendants motion was granted with conditions and the defendants failed thereafter to pursue and protect their interests as granted.**

It is not the duty of the Court to provide a reporter, other that what is provided under the limited budget of the Court. It is, however, the case that this Court determine the qualifications of those persons to whom it would entrust the record of the Court for purposes of accuracy and trustworthiness of the record. The Court is not obliged to simply rely on the representations of the party seeking the assistance of an independent and qualified court reporter. A court reporter is essentially an officer of the Court, not an agent of the party paying the reporter. II. The defendants argue to the Court that they were denied due process of law due to a lack of a perfect record of the proceedings before the Court for cause of interment inaudibles found in the Courts own recording/reporting system.

Findings of Fact

The defendant and plaintiffs were ORDERED from the bench to report any problems with the hearing transcripts to the Court on November 9, 1999, and neither party did so. Both the defendant and the plaintiff became aware of concerns in the transcription of the taped proceedings nearly a full month prior to submitting their written conclusions, by written notice, as was the Court. In fact, after the very first proceeding it was cautioned by counsel for the plaintiffs, Wm. P. Battles, that the record was being garbled and asked that the Court caution the speakers in reference to preserving the record. The defendants, as well as the plaintiffs, were free to make motions for new hearings

or other protective motions prior to the filing of their written concluding statements, but failed to do so and instead like the plaintiffs **submitted their closing arguments on the record as presented**.

Wherein the trial record as a whole, **including hearings on April 24, 1999; May 14 1999; June 30, 1999; and November 9, 1999; along with records of the September 23rd and 24th proceedings, of 1999**, are all available to this Court and the parties, and well evidence the foundation and outcome of the Courts considerations in rendering the decision to grant the Preliminary Injunction despite the lack of a "perfect" trial record as claimed required by the defense.

The defendants knew they were obligated to put on evidence to rebut the plaintiffs evidence and simply failed to do so. Indeed, more so than not, the record and recollection of the Court actually reflects that the majority of the evidence and testimony solicited and presented to the Court by the defendants actually went to support each and every claim of the plaintiffs as raised in these proceedings. Accordingly, the **defendants failed to offer the Court barely so much as one piece of evidence that was reliably found to be admissible within the Navajo Nation Rules of Evidence**, or in aid to their assertions contrary to those of the plaintiffs.

Conclusions of Law

The defendants were not denied due process pursuant to the 'harmless error' rule of Chapman v. California, 386 US. 18 (1967) that overturned the case of Griffin, upon which the defendant would apparently prefer the Court to rely as they assert and for which the defendants,

through counsel, had a responsibility to inform the court of, in that Griffin had been superceded by Chapman -but failed to do so.

Further, the defendants are not being denied the ENTIRE court record, as found in the cases they rely upon and therefore defendants' case cites are without merit in this case but in misguiding this Court. The Court therefore concludes that as a matter of law, notwithstanding our own Rule 61 of the Navajo Nation Rules of Civil Procedure, and in agreement to Chapman the existence of inaudible sections of the tape recordings is harmless, when the record can still remain to be considered in its whole dispositive of the findings, conclusions and orders of the Court.

As offered by the United States Supreme Courts "Since Chapman, we have "consistently made dear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." United States v. Hasting, 461 U.S. 499, 509 (1983). In Hasting we again emphasized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibiity of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." Id, at 508509. " United States v. Lane et al 474 U.S. 438. 446 (1986). The Court here, in considering the trial record as a whole, finds the same well supports the findings and conclusions of this Court without any question in the mind of the Court whatsoever.

III. The next argument offered by the defendants is that the Preliminary Injunction should be denied or modified because the findings go to the merits of the case.

Findings of Fact

The burden of coming forward in the seeking of a Preliminary Injunction, premised on the case in chief under the Navajo Nation Rules of Civil Procedure, is elementary. Pursuant to Rule 65(c) the moving party, here the plaintiffs, are put to the burden of "presenting evidence sufficient for the court to find all of the following"

That the moving party has or is claiming a protectable right or interest and has a high likelihood of success on the merits;
That irreparable injury, loss, or damage, to that right or interest is likely to occur unless the preliminary injunction is issued;
That the threatened injury, loss or damage is substantial in nature or character; and
That the moving party does not have an adequate remedy law.

Likewise, Rule 65(d) of the Navajo Nation Rules of Civil Procedures, provides, for judicial economy, not dissimilar from any other jurisdiction of our sister sovereign the United States, that
Before or after the commencement of the hearing of a petition for a preliminary injunction, the court may order trial on the merits to be advanced and consolidated with the hearing of the petition. Even when this consolidation is not ordered, any evidence received upon a petition for a preliminary injunction, which would be admissible upon the trial on the merits

becomes part of the record at trial and need not be repeated at trial. This subdivision shall be construed to save the parties any rights they may have to trial by jury.

The Defendants were warned several times during the proceedings that they were failing to meet their responsibility of rebutting the plaintiffs evidence and testimony and that they were proceeding in nearly a fatal fashion to not only the preliminary injunction but as to the case in chief and that likewise they were thus far actually reinforcing the contentions of the plaintiffs in defense witness after defense witness, and the collective of the evidence and testimony before the Court was overwhelmingly in favor of the plaintiffs.

And accordingly,

The plaintiffs proved absolutely that they were being denied protectable rights which were guaranteed at law and therefore had a certain likelihood of success on the merits -which is largely reduced to damages; and,

The plaintiffs likewise proved that unless relief was granted, by way of a preliminary injunction or otherwise, that such violations on their protectable rights would continue with resulting injuries, losses, and damages.

That the injuries, losses, and damages were substantial in both their nature and character, including injuries ranging from damages to reputation to money damages; and,

And that unless a preliminary injunction was granted the harm, injuries, damages, and losses, would continue unimpeded.

Likewise, the Court is obliged by Rule of Court and in the exercise of judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief trough occurring during the trial on the merits, and that evidence becomes a part of the record at trial and need not be repeated at trial. See Rule 65(d). Such preservation of the record does not go to taint the trial by jury requested by the plaintiff but does substantially reduce their burden of proof which has already well been met even as to the case in chief. Whereas, as the Court would note, that but for the preservation of trial by jury, in most instances of preliminary injunctions it is more normal to actually combine the proceedings in chief with the proceedings for the preliminary injunction.

For example, Lauren Schafer, a defendant's witness, admitted on September 24, 1999, that after an exhaustive study of Mrs. Singer's records, **she did not have one piece of evidence** as to Mrs. Singer's intent to commit fraud. For example, the Court observed that the person who initiated the termination process, was also the grievance hearing officer (unbeknown to Singer) and admitted he had a problem with being so thinking that it was improper for him to proceed by his own judgment but did nonetheless.

For example, no defenses were made for the treatment of Fred Riggs and Al Dickson, except that the time card errors diminished after the discipline meted out, **supporting the theft claim of the plaintiffs in that their reputations were taken without their permission for use of the district to discourage time**

card errors and for speaking out regarding discrimination and unequal treatment of Native Americans in employment with the Health Services District.

For example, the defense presented evidence that the reason that Singer was fired was because she allegedly called in to work to have someone punch her time card, and then offered testimony of one witness that such conduct was common among the employees of the Health Services District, and so common in fact that she herself had certainly done the same thing "at least a hundred times" but had never even been disciplined in any form or fashion. This witness was non-Indian.

For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs is only something this Court would prefer to hear the evidence on only one time - in its life time.

For example, coming to understand that because Native American elders, grandmothers, and grandchildren are being denied medical care and treatment even as under a direct government contract with the United States Government to provide health care to Native Americans because they are being arbitrarily required "to show their Certificate of Indian Blood" to actually receive necessary health services, when the required documentation for Health Services through the Indian Health Service is a "Beneficiaries Identification Card" at most, is something this Court would have preferred to have never heard.

The Court's resources, and the plaintiffs resources are limited - and the findings, facts and case are clear, even as to the merits in chief.

Conclusions of Law

The findings of the Court had no alternative but to reach to the merits, as such is the primary burden of the plaintiffs coming forward. The plaintiff had a clear duty to demonstrate to the Court that they are substantially entitled to judgment on their case in chief, in order to prevail on the preliminary injunction. The defendants, likewise, failed to put on any credible evidence to rebut the volume of testimony and evidence of the plaintiffs, after having ample opportunity to have done so.

The Court is therefore well within its rights to find to the merits, the same way as a Court may find for a party if the plaintiff fails to prosecute a claim, in order to protect the due process rights of the plaintiffs, and to protect the Court's processes from being used for harassment and other wasteful and abusive purposes. The Court, given the proceedings to date, the testimony and evidence of record, is obligated to grant relief to the plaintiff and provide relief to those harmed, damaged, and injured.

"Courts invested with the judicial power of the United Stases have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. " Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991); Link v. Wabash R. Co., 370 U.S. 626, 630-631 (1962). The Supreme Court recognized in Roadway Express that outright dismissal of a lawsuit, which has been upheld in Link, is a particularly severe sanction, yet is within the court's

discretion. 1st Sess., 6 (1852); Roadway v. Piper, 447 U.S. 752, 765 (1980)."

The Preliminary Injunction was addressed to rectifying the harm done. The defendants' recommendation fails to address the financial harm suffered by the plaintiffs which has injured their families, as well as, failing to recognize, much less rectify, the harm to their reputations and the patients. As such, the Court finds the Injunctive Order is well within the three prongs of Missouri v. Jenkins, ____U.S. .____ (1995), at page 16. The defendants neither recognized the three prong test of Missouri in their pleadings, nor recognize the Navajo tradition of compensating injury with money or other things of recognizable uniform value. The defendants' definition of 'status quo' differs from the Court's, in that, **the Court's definition wishes to place the plaintiffs in nearly as good a position as they would have been without the harm of the defendants, and that includes financially.**

IV. The defendants rather vaguely continue to misstate and minimize the Court's jurisdiction.

Findings of Fact

A 'forum of resolution' and the premise of having a hearing for injured parties among Native American people predates the European settlers and is well grounded in Navajo customs and tradition. This tradition has continued through the continuum of history, and in contemporary time has come to include the provisions of the United States Congress by way of the 1968 Indian Civil Rights Act which colored tribal courts with federal legislative mandates in 25 USCS § 1301.

And accordingly the Court cites to tribal code and Montana and Strate to further its finding of jurisdiction.

Conclusions of Law

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because ***the defendants became plaintiffs by filing their counterclaims.*** In accord with Dodge v. Nakai, 298 F. Supp.. 17 (Ariz. dist. 1968) and Clark v. Barnard, 108 U.S. (1883). This Court has jurisdiction.

Alternatively, the Court also has jurisdiction over the defendants because, even if the defendants are an 'arm of the state', (which they have not shown any evidence to support), the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings. The Court therefore concludes that it has legal foundations for jurisdiction in this case, within the Navajo Nation's inherent sovereignty, the Navajo Nation Code, 25 U.S.C.S. §1301 and 1302, the Montana and Strate decisions, and the United States Supreme Court rulings in Clark v. Barnard, 108 U.S. (1883) as cited approvingly in College Savings Bank v, Florida Prep Aid Postsecondary Education Expense Board et al. U.S._____ decided June 23, 1999.

"We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which may waive at pleasure; so that in a suit,

otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant. its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and [108 U.S. 436, 448] citizens of other states." " Clark v. Barnard 180 U.S. 436, 448 (1883).

In conclusion, the Court finds the arguments and case cites of the defendants without merit or legal foundations. The Court, despite previous denials, now attempt to justify their placing of Native American patients in danger in a cloud of "confusion" on the 14th day of May, 1999. The prior Temporary Restraining Order directed the defendants to not interfere with the Clinic operations. This effort of the defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients and families relying on the clinic for health care. Likewise such cold, insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants bad faith to these proceedings and present a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of the harm of their

malignant acts, and who lack any remorse for their harm to the plaintiffs, the patients and this Court.

The Preliminary Injunction, and findings of the Court, accordingly shall remain undisturbed. ***To do so would continue to place Navajo employees and patients who the defendants interact with at both Montezuma Creek Clinic and at Monument Valley, in harm's way***. Navajo common law, is customs and traditions, mandate that the Court protect the people, and this Court shall not hesitate to exercise all its powers to do so. The Motion to Dissolve or Modify the Preliminary Injunction Order be and is, therefore, denied.

IT IS THERFORE ORDERED that pursuant to the Navajo Nation Rules of Civil Procedure at Rule 11 and this Court's tribal and federal authorities, and the Court's recognized inherent authority to protect its judicial processes, the Court hereby ORDERS as follows pursuant to its Preliminary Injunction:

That the Motion to Dissolve or Modify the Preliminary Injunction Order be and is hereby denied.

The Preliminary Injunction as issued shall be carried out immediately, and no later than the 3rd day of March, 2000, in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt powers of this Court.

That the defendants be and are hereby ordered to immediately reinstate Mrs. Singer as a x-ray and ultrasound technician making her whole to the 1st day of November, 1998, not later than the 3rd day of March, 2000, with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court.

That the defendants be and are ordered to immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation as occurring at the time of his reduction in force and reduction of pay with

written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status; and provide written confirmation of such compliance on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefit to the plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately with confirmation of such compliance delivered in writing to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with written compliance delivered to this Court on or by the 3rd of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to not, within the territorial jurisdiction of the Navajo Nation, put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise, and provide a copy of the written policy to this effect on or by the 3rd day of
March, 2000, or be subject to the contempt powers of this Court and,
That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel, or be subject to the contempt powers of this Court and,
That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of March, 2000, by and through the Registry of this Court, or each and every one of the defendants shall be subject to execution on their personnel properties, and otherwise individually subject to the contempt powers of this Court and,
That the prior Order of the Court waiving any security deposit of the part of the plaintiffs be and is hereby affirmed; and,
That the Defendants be and are hereby prohibited from:
Eliminating any Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic or any other facility or activity

of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation; and, Interfering with the laboratory services to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District Conducted within the territorial jurisdiction of the Navajo Nation

That the defendant shall immediately make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st day of January, 2000, and provide written confirmation of such payments on or before the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are prohibited from interfering with any form of patient care being provided by the Montezuma Creek Clinic; and,

That the defendants be and are hereby immediately ordered to cease billing eligible IHS patients for medical services; and,

That the Court further hereby Orders the defendant to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic IHS patients to return to the Montezuma Creek Clinic for treatment, including informing such Native American patients that as an IHS patient they do not have to directly pay for their health

care treatment at the Montezuma Creek Clinic, with written confirmation of such compliance provided to this Court on or before the 3rd of March, 2000, or be subject to the contempt powers of this Court and,
That the Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,
That the proceedings in chief herein be and are hereby scheduled for initial pretrial conference on the 18th day of April, 2000, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining as previously noted to the Court.
So Signed and Ordered this 1 day of March, 2000.
JUDGE, District Court of the Navajo Nation
"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."
Clerk, District Court of the Navajo Nation
1. That in the event that the defendants fail to obey the Order of this Court, commencing the 4th of March, 2000, the defendants shall be fined at the rate of $10,000.00 (Ten Thousand Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety.*****
2. That each and every personal defendant and defendants counsel will pay $1000 per day of the $10,000 daily fine beginning on March 2, 2000, from their own personal assets.
3. **That any and all appeals or attempted appeals will not forestall these fines if the Preliminary Injunction Order is not carried out in accord with this Order.**

4. Such fines are a fair and just means for this Court to protect its judicial processes, **and to ensure its orders that protect the people**, will be carried out.

SR-CV-162-99-CV
IN THE DISTRICT COURT OF THE
NAVAJO NATIONJUDICIAL
DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER, Fred Riggs C#18570;
Alison Dickson C#212,765.
Plaintiffs,
vs.
SAN JUAN COUNTY; San Juan Health, Service District:
Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Ateitty; Commissioner Mark Maryboy; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway; and other John and Jane Does as yet unnamed in their personal and official capabilities,
Defendants.

SPECIAL ORDER IN AID TO SATISFACTION OF PRELIMINARY INJUNCTION

NOW COMES THE COURT and having received and reviewed the plaintiffs' motion for a special order and finding good cause therein hereby Orders as follows:

1. That the defendants are hereby restrained from alienating any and all money, property and assets of any type until the plaintiffs are paid their relief as granted in the Preliminary Injunction Order, and.
2. That a list of all assets be immediately given to the plaintiffs since the defendants admitted in their concluding statement that the defendants state of finances were in a precarious position; and.
3. That defendants immediately list the plaintiffs first in order of priority as secured creditors on the files of the County Recorder of San Juan County and any other county wherein their property is located; and.

4. That the defendants provide a complete income tax return for 1998 and 1999, including all attachments and schedules submitted to the IRS with the returns;
and.
5. That any disobedience to this Order will be viewed as contempt of the Court and warrants for the
arrest of the defendants disobeying this Order will issue;
and
6. That the plaintiffs are granted leave to seek enforcement of this Order as appropriate in any Utah or
federal Court where it will be enforce pursuant to principles of comity and applicable law.
So signed and this 6 day of March, 2000.
JUDGE RAYMOND A. BEGAYE
"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."
Clerk, District Court of the Navajo Nation
"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation." Clerk, District Court of the Navajo Nation

SR-CV-162-99-CV
THE DISTRICT COURT OF THE
NAVAJO NATION JUDICIAL
DISTRICT OF SHIPROCK

DONNA SINGER Fred Riggs C#18570;
Alison Dickson C#2 12,765;
Plaintiffs,
vs.
SAN JUAN COUNTY; San Juan Health Service District;
Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy fn1; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway fn2; and R. Dennis Ickes, Farmers/Truck Insurance Co. and John and Jane Does as yet unnamed in their personal and official capabilities.
Defendants.

ORDER MANDATING THAT ALL DEFENDANTS' TO BE BOUND BY THE PRELIMINARY INJUNCTION
ORDER

Now comes the Court, having received and reviewed the plaintiffs' motion to bind the defendants R. Dennis Ickes, Esq. and Farmer's Insurance Group of Companies and/or Truck Insurance by the Preliminary Injunction Order, based upon the findings of the Court in the Preliminary Injunction Order, after approximately 6 hearings over a nine month period. The Court bases this Order upon the following findings of fact and conclusions of Law.

1. On December 28. 1999, the Court made factual findings pertaining to misrepresentation of case law

and Sets, intimidation of witnesses, spoilation of evidence, upon which the plaintiffs have made a motion for a supplemental pleading, and that said activities were known, or should have been discovered easily by a reasonable investigation that is required pursuant to NNRCP at Rule 11; and,

3. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, as based upon the Court's findings, did participate in these activities prior to the issuance of the preliminary injunction order, and,

4. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, did participate fully in all the proceedings from approximately April 23, 1999 through November 9,1999, and in the defendants' motion to dissolve or modify the Preliminary Injunction Order, dated December 28, 1999;

and,

5. That Mr. Ickes, and Farmer's insurance Group of Companies and/or Truck Insurance Company, as his employer, were aware, or should have been aware, of the actions of the defendants, and their own actions in privity with the defends based upon a reasonable investigation as required pursuant to NNRCP at Rule 11;

and, Therefore, the Court now Orders that Mr. Ickes and Farmer's insurance Group of

Companies and/or Thick Insurance Company are to be bound in privity with the previous defendants in this action as now identified John and Jane Does, who prolonged the proceedings, end further deprived the plaintiffs' of due process and equal protections of the law, and are hereby bound by the Preliminary Injunction Order of December 28, 2000 red their names

be herein after, added to the defendant caption, and are officially declared to have responsibility for all legal liabilities incurred by the defendants as declared in the December 28, 1999. Preliminary Injunction Order.
Signed this 27 day of 2000.
Judge Raymond Begaye
"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation." Clerk, District Court of the Navajo Nation
Footnotes
fn1 In his official capacity only.
fn2 In her official capacity only

AFFIDAVIT OF SAN JUAN COUNTY COMMISSIONER MARK MARYBOY

I, Mark Maryboy, San Juan County Commissioner, being duly sworn, do hereby state under penalty of perjury that the following facts are true to the best of our information and belief:

1. I am a duly elected San Juan County Commissioner.
2. I have been a County Commissioner for 14 years
3. The area of my primary representation is much of the Utah Strip of the Navajo Nation reservation
4. My constituents are primarily Navajo.
5. I am bilingual, speaking both Navajo and English.
6. I have witnessed my constituents coming to the concerning bills they do not understand, and do not know bow to rectify through the appropriate government agencies.
7. I know the Chapter's within the Utah strip have no means for correcting these bills through the different federal chapters.
8. I know that there has been a definite effect of people not going for medical care because they are afraid they may have bills to pay.
9. I witnessed people at Navajo chapter meetings speaking publicly about their bills stating that they received bills for services never received.
10. The people wish to get the bills resolved but do not know how.
11. Many of the people receiving these bills only speak Navajo and therefore they had no way of knowing the District would not bill IHS or other insurance without an interpreter.
12. Except for this past year or so, the Navajo people have not complained of the bills before this time, so they must not have received them.
13. The bills I have seen are years old.

14. I have attended San Juan County Commission meetings where resolutions from the Navajo Chapters are ignored and not even kept in a file as a Commission record.

15. Aneth and Red Mesa Chapters stated the District's actions to Ms. Singer and Mr. Riggs had a direct and detrimental effect on the health and welfare of the Navajo people in written resolutions and these were ignored. Of course without a file the Commission can claim they never received them.

16. My constituents often speak only Navajo, do not know what a 'HICFA' number is that they need for medicaid reimbursement, often have no phones and live many miles off main highways.

17. My constituents are often unfamiliar with the anglo language and anglo billing and court collection processes.

18. I suggested Roger Atcitty's name as the selection for the San Juan Health District governing board and it was accepted. Mr. Atcitty is a Navajo member.

19. The Chapter members and I have observed that Mr. Atcitty, as chairman of San Juan Health District, has wholly failed to represent the needs of his people on the San Juan Health District governance board, and have never heard of Mr. Atcitty challenging County or District officials, and appears more concerned with looking out for only his and his family and friends' own financial future and his own future economic and social ties than the needs of his people.

20. Significantly, when Mrs. Singer was wrongfully fired and falsely charged with fraud that was broadcast throughout the small San Juan County community to her everlasting detriment, Roger Atcitty's sister Brenda Brown became the new Montezuma Creek

Clinic manager and is now the manager at Monument Valley.

21. I have observed that Mrs. Brown seems hard working, but my constituents report that she is unable to forcefully stand up to the San Juan Health District in behalf of the Navajo people getting bills and who are not being seen as Mrs. Singer would and could have had she remained manager of Montezuma Creek Clinic.

22. I have observed on numerous occasions that Cleal Bradford, CEO of San Juan Health Services District, meets with the County Commissioners Ty Lewis and Bill Redd prior to and immediately after Commission meetings, and Bradford always leaves the room when I arrive, and reappears when I leave.

23. Mr. Bradford has appeared at County Commission meetings and had resolutions passed by Ty Lewis and Bill Redd without being on the agenda, some of these resolutions dealt with spending taxpayers' money.

24. In addition to the billing situation it is my testimony that I have observed the following acts of discrimination against the Navajo people who are my constituents for as long as I have been County Commissioner;

a. I speak and make comments, raise objections, and voice concerns and more often than not, these are not reported or sparsely reported in the Commission minutes. It is as if I am not really there.

b. Road contracts and building contracts go primarily to white contractors and the same persons for years at a time. Minority contractors who do win a bid must cross every t or dot every i to keep the contract, unlike the white contractors.

C. Chapter resolutions are seldom kept in a file and are ignored on a rather consistent basis.

d. It took over 25 years of Court litigation and fighting for San Juan County School District to come into compliance with their own consent decree wherein they were to provide equal educational opportunities for the Navajo children. This County's word means little or nothing for honesty.

e. Funds allocated for Navajo children were spent on non-Navajo sports teams equipment, leaving the Navajo children without.

f. The County receives Payment In Lieu of Taxes from the federal government for and in behalf of the Navajo people do not pay property taxes.

g. Many of the businesses in San Juan County are associated with federal and state funds that the County Commissioners have a strong hold over at the local and state level, and these funds seldom go to Navajo businesses, SO there is a loss of hope for any future development within the Navajo Nation boundaries.

h. The County has not spent money on road development, water development, recreational facilities, electrical development, or library development within the Navajo Nation areas to the equal extent they have spent money for these items in the Northern and less populated part of the County. The BLM roads are grated and drained for the most part Indian dirt roads are left
without grading and drainage and several are impassible except for four wheel drive vehicles or even horses.

i. Children living on such roads find it nearly impossible to get to the bus stop on the highway due to snow or rain and often drop out of school at a very early age.

j. The suicide rate for Navajo children on the Utah strip is much higher than in the nearby anglo population.

k. Emergency vehicles often can not get down such undeveloped roads.
l. Economic, political and social intercourse is thwarted by such roads.
m. Often the roads in the Utah strip have no guard rails and lethal roll overs are more common south of Blanding.
n. Criminal prosecutions of Navajo and minority people is greater than that of whites, even though the populations are nearly the same.
o. I have witnessed road blocks for drunk drivers just prier to entering the reservation, but seldom road blocks for drunk drivers for primarily nonIndian drivers going to Lake Powell or going hunting.
p. There is currently a court case several years old involving fair representation of Navajo people on juries I am aware as Commissioner that generally Navajos who may speak only Navajo are prosecuted by all white english speaking juries in Monticello, Utah and this practice is generations old.
q. It is my experience that San Juan County Commissioners run the San Juan Health Dist[illegible]t, and nearly every other special district in San Juan County by sifting on interlocking boards of special districts that are supposed to be separate body politics.
r. There is a clique of white people who are friends and relatives of Ty Lewis and Bill Redd, County Commissioners, that get selected for boards and any Navajos selected are those who did as they are told.
s. Nepostism is rampant in San Juan County.
t. Constituents have told me of the disrespect and lack of dignity they are treated with at San Juan Health District facilities as well as, in the Courts, the Health District, and by County Attorney Craig Halls.

u. Significantly, a stiff fine or other financial penalty will drive a Navajo citizen back onto the reservation to live with relatives to avoid being sent to jail because he or she can not pay the fine. Such a practice makes the Navajo population smaller in the primarily white north county.

v. **Currently, it is Craig Halls who is obtaining bench warrants on many Navajo people, wherein they must post a $200 bond to prevent jail time, in regards to the bills from San Juan District. It is my information his daughter is working as the Court clerk**

w. Overall, the racial and political discrimination against the Navajo in this County is well entrenched and is over a hundred years old, and I believe without well policed Court orders that demand immediate obedience, and confirmation of their obedience, and personal sanctions against the parties for disobedience, the Court cases will be left to be fought out for the next 25 years
as the school case was, with direst injury to the Navajo people who are my constituents.

x. It is my information that San Juan Foundation is a non-profit organization who is formed for educational purposes and was initiated and is directed by Cleal Bradford. San Juan Foundation took over the Monument Valley Clinic facilities while Cleal Bradford was the head administrator for San Juan Health Service District, even though the San Juan Foundation as I understand it, is
primarily formed for educational purposes. San Juan Foundation can become a private organization at any time, and I have been told there are several hundreds of thousands of federal dollars if not millions, in the foundations' accounts.

y. Workers commonly told me that while Cleal Bradford was working for the Utah Navajo Development Council conjunction with the Utah Navajo Trust fund, prior to 1992 when the fund was nearly bankrupt, that workers building homes for Navajos for UNDC helped build Mr. Bradford's son's house and can be verified by a Utah State legislative audit. Mr. Bradford and his
daughter wrote a book "Silent Thunder" Copyright 1974, he sold them for approximately $5.50, and published with UNTF money that can be proved by legislative audit.

z. I have also observed that the County powers will use malicious gossip and wide publication of false gossip against those who seek are in opposition to that If you are their enemy, they will retaliate in numerous ways

25. The San Juan County Sheriff recently terminated a recent academy graduate Navajo Sheriff Officer during the officer's probationary period by 1. . placing the Officer in a position he was not certified to perform in, and the Sheriff knew or should have known he was not properly certified to perform in, 2. without a written list of reasons for termination, 3. without warning and without a hearing, 4. in spite of letters of support in his behalf from the Navajo Community, 5. with untrue accusations the Officer could not respond to and 6. the Sheriff was arrogant and rude in dealings with me while I was investigating the matter. There is only one Navajo officer left on the Sheriff's force of over two dozen officers as estimated. This officer graduated from Whitehorse High School with the highest scholarship award. He has no police record I am aware of, and yet the Sheriff was accusing this officer of criminal activity without naming the time, place, or witnesses the officer

could challenge and confront with questions. I can not find any fair dealing of the County at any level, with this Officer.

26 The Commissioners' review of this Sheriff matter amounted to no review and further the Commissioners showed a total lack of concern for this situation

27. Recently I became aware of a situation at a local High School event, on state owned land, that was not policed, and a person was drunk. The school official had to police the event and the foregoing Navajo Officer often would police such events and the School misses this officer and stated as much to the County Commissioners.

28. With approximately half of the San Juan County population being Navajo, it is interesting to me to try to understand how a Navajo non-english speaking person can be arrested and read his rights when no one speaks Navajo except one person. Additionally, such a Navajo accused that is arrested may have a problem with communicating illness or other emergency needs while in jail.

29. At this time, I fully and openly support this Court ordering a full and complete GAO audit of all the federal funds coming into San Juan County and all San Juan Special Districts and all funds given to San Juan Foundation to examine if they are being spent in accordance to their grants, etc.

30. Further, I fully and openly support a complete Grand Jury investigation of the financial expenditures and bookkeeping of San Juan County, and all the San Juan Districts and any organizations, such as Quorum Health Care and San Juan Foundation, that the San Juan County or San Juan Health District or other Special Districts has contracted with for management to fully and minutely examine the bookkeeping for

these entities to set if federal and state funds have been mispent, and to find out how much of a fiction this County's budget may be.

31. It is my information that recently the County accountant, who relies upon the County for his livelihood has been made a San Juan Health District governance board member. I do not believe he will enjoy the luxury of exercising his independent judgment.

I, Mark Maryboy, being a duly elected San Juan County Commissioner, being duly sworn, hereby states under penalties of perjury that the forgoing statements are true to the best of my belief and knowledge.

NOTARY CERTIFICATE

County of San Juan

State of Utah

I Witnessed Mark Maryboy swear before me, having appeared with picture identification, under penalty of perjury, with his right arm raised, that the foregoing statements were true to the best of his information and belief and he did sign this document in my presence.

NOTARY PUBUC

My Commission expires on the 20th day of Sept. 2002

STAN JOHNSON

Notary Public

State of Utah

My. Comm. Expires Sep. 20, 2002

P.O. Box 304 Bluff, UT 84512

Susan Rose #7985
Attorney for the Defendants
11091 South Shilling Ave. Suite 2452
South Jordan, Utah 84095
(801) 576-0091

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL
DIVISION
UNITED STATES OF AMERICA

DR. STEVEN MACARTHUR, Michele Lyman, Helen Valdez, Donna Singer, Fred Riggs, and Al Dickson,

civil no. 92-C-1071TS

plaintiffs,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICE DISTRICT, Commissioner J.Tyron Lewis, Commissioner Bill Redd, Craig Halls, Reid Wood,Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. James Redd, Dr. Jones, Dr. Nielsen, Richard Bailey, Mr. Ickes, Truck Insurance, Marilee Bailey, Ora Lee Black, Gary Holladay, Laurie Walker, Carla Grimshaw, Gloria Yanito, and other John and Jane Does as yet to be identified, officially and individually, jointly and severably,

defendants.

AMENDED COMPLAINT
TO CONFORM TO THE EVIDENCE & THE

10TH CIR. COURT 10-7-02 OPINION
(Jury Trial Demanded)

COMPLAINT FOR INJUNCTIVE RELIEF, AN ORDER BY WAY OF A WRIT OF MANDAMUS, COMPENSATORY AND TREBLE DAMAGES, AND ATTORNEY'S FEES AND COURT COST AND TO ENFORCE A NAVAJO COURT ORDER AND GRANT ATTORNEY

PART II- MRS. SINGER, MR. RIGGS, AND MR. DICKSON

COMPLAINT TO ENFORCE A TRIBAL COURT ORDER

This Amended Complaint is being made pursuant to the Tenth Circuit Court's October 7, 2002 ruling.

Names have been dropped from the caption only in compliance with the dismissal of parties since the time of filing the original complaint. While Truck Insurance and Mr. Ickes were dismissed, they were not dismissed with prejudice and then only upon the facts as found of the District Court.

The Orders seeking to be enforced as issued from the Navajo Nation are as follows: (1)The "FINDINGS, OPINION, AND JUDGMENT AT PRELIMINARY INJUNCTION" issued December 28, 1999, (2)ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE OR MODIFY THE PRELIMINARY INJUNCTION ORDER issued March 1, 2000; (3) SPECIAL ORDER IN AID TO SATISFACTION OF PRELIMINARY

INJUNCTION issued March 2, 2000; (4)ORDER MANDATING THAT ALL DEFENDANTS BE BOUND BY THE PRELIMINARY INJUNCTION ORDER March 15, 2000 as attached hereto and incorporated herein.

Plaintiffs complain of harms occurring at Montezuma Creek Clinic and in the Navajo Nation Court, both locations within Indian Country.

This Court's Jurisdiction and Venue

This Court has jurisdiction under 28 U.S.C. 1331, 1362; 28 U.S.C. 2201, 2202; 1631; and Federal Common Law, and the unique trust relationship the United States Government must fulfill in relation to Indian Tribes. Venue for this enforcement order is proper under 28 U.S.C 1391 and 28 USC 125.

Jurisdiction of the Authority of the Navajo Nation

The Navajo Nation is a Federally recognized Indian Tribe, that signed the Treaties of 1848 and 1869. The United States Congress has fostered the Navajo Nation legislative, executive and judicial branches of government and Indian Preference in Employment acts by statutes, funding, agency oversight and training. The Navajo Nation has legislatively created the Navajo Preference in Employment Act 15 N. T. C. 601 et seq. and its Court system 7 N.T.C. 201 et seq. Within the Navajo Nation, Tribal Court jurisdiction by Navajo statute governs "All civil actions in which the defendant is a resident of Navajo Indian Country, or *has caused an action to occur within the territorial jurisdiction of the Navajo Nation*. " 7 N.T.C. 253. Within the remaining inherent sovereignty of the Navajo Nation, the Tribe is embued with regulatory and police powers to prevent injuries to the health, and public safety of all persons within its exterior borders, and oversee contracts with Native Americans. See

Nevada v. Hicks, Montana v. Strate. The Navajo Nation also retains the right to prohibit persons from entering the reservation boundaries.

The injuries as found in these Tribal Court orders go to violations of Navajo customs and traditions and common law, violations of the Navajo Bill of Rights, Navajo Preference in Employment Act, Indian Civil Rights Act, numerous rules of Navajo Civil Procedure, requiring a uniquely Navajo analysis. Article 1 Sec. 8 of the United States Constitution, authorizing Tribal Courts to be formed by Indian Tribal legislative authority. They are also empowered by the Navajo Nation Code 7 N.T.C. 201 et seq. residual inherent powers under the Treaties of 1848 and 1868, 25 USC 461 et seq, 25 USC 1301, et seq, Indian Preference in Employment Act, 25 U.S.C. 450, 42 U.S.C. 2000(e)-(2)(i); Navajo Bill of Rights, Navajo Preference in Employment Act, and Navajo Customs and Traditions.

The Navajo Court found that all parties have "significant contact" with the Navajo Nation, and the clinic is "a major health care provider to the Navajo and other local Native Americans who look to this Court for justice." pg. 1 Findings, opinion, and judgement at preliminary injunction. The Navajo Court also found that Chapters had passed resolutions stating that who managed the clinic would effect health care in the area. And that the people served by the Clinic looked to the Navajo Courts for justice. Page 1. Likewise the defendants had 'significant contacts' as the Navajo Court found the Defendants did "commercially and voluntarily within their corporate powers contract to provide services..." to the Navajo people living within the Navajo Nation territorial limits. Pg. 11.Findings, opinion, and judgement at preliminary injunction.

The Navajo Court found that the Defendants

had violated protect able rights that "include denial of due process; denial of equal protection; denial of free speech and assembly; defamation; theft; conspiracy; and interference with the public policies of the Navajo Nation." pg. 14 Findings, opinion, and judgement at preliminary injunction.

Further, the Court found that Navajo Preference in Employment Act had been violated. Pg. 18 Findings, opinion, and judgement at preliminary injunction. Other sources of the Plaintiffs' legal rights that were violated are the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and IHS contract obligations" [pg. 19 Inj.] "notwithstanding the 1968 Indian Civil Rights...". pg. 11 Findings, opinion, and judgement at preliminary injunction.

"The Court therefore concludes that it has legal foundations for jurisdiction in this case, within the Navajo Nation's inherent sovereignty, the Navajo Nation code, 25 U.S.C.S. §1301 and 1302, the Montana and Strate decisions, and the United States Supreme Court rulings in Clark v. Barnard, 108 US [sic] 1883 as cited approvingly in College Savings Bank v. Florida Prep Aid Postsecondary Education Expense Board et al, _____ U.S._____ decided June 23, 1999. " pg. 10 Order denying Motion to dissolve. The jurisdiction is also well grounded in Navajo customs and traditions. "This tradition has continued through the continuum of history, and in contemporary time has come to include the provisions of the United States Congress by way of the 1968 Indian Civil Rights Act which colored tribal courts with federal legislative mandates in 25 USC §1301. Pg. 10 Order denying motion to dissolve. . . "In accord with Dodge v. Nakai,

298 F. Supp. 17 (Ariz. dist. 1968). " Id. Under the Treaties of 1848 and 1869, the judiciary regulates laws founded upon all the residual inherent rights, powers, responsibilities, authority of general jurisdiction for injuries occurring under Tribal law within Indian Country granted to the Judiciary under Navajo Nation legislative enactments. 7 N.T.C. 253, 254. The Tribal Court's jurisdiction is over "all other land held in trust for.... the Navajo Nation or any Band of Navajo Indians." In this case, the Court is on Navajo reservation Trust lands, and Montezuma Creek Clinic is on UNTF trust lands.

History

The Plaintiffs put forth a lengthy complaint with attachments into Navajo District Court seeking a TRO, Preliminary Injunction and complaint for damages on or about March, 1999.

Plaintiff parties:

1. Donna Singer, plaintiff, a non-Indian spouse of a Navajo Tribal Member who lives outside but near the reservation, and who worked at Montezuma Creek Clinic, a subsidiary clinic of San Juan Health Services District at the time of her injuries. She is currently is employed by Utah Navajo Health System, a Native American non-profit organization controlling Montezuma Creek Clinic today. The Navajo Court found Mrs. Singer enjoyed a unique "in-law" status within the Tribe, as is found also in the Navajo Preference in Employment Act.
2. Fred Riggs, plaintiff, is a Physician's Assistant who is an enrolled member of the Navajo Nation, lives within the Navajo Nation in New Mexico, and worked at Montezuma Creek Clinic, a

subsidiary clinic of San Juan Health Services District, at the time of his injuries. He is currently employed by Utah Navajo Health Systems, a Native American non-profit organization, controlling Montezuma Creek Clinic today.

3. Al Dickson, plaintiff, is an enrolled member of the Navajo Nation, living in Utah within the Navajo Nation, who worked at Montezuma Creek Clinic, a subsidiary of San Juan Health Services District, at the time of his injuries. He is currently employed by Utah Navajo Health Systems, a Native American non-profit organization, controlling Montezuma Creek Clinic today.

These three plaintiffs are seeking an ORDER from the United States District Court to enforce four separate Navajo Nation Orders hereby referenced as attached and incorporated herein. All factual findings of the Navajo Court are incorporated herein.

The Defendants

The defendants in the Navajo Court, as captioned, are San Juan County, San Juan Health Services District, Rick Bailey (County administrator and CEO of the District); Reid Wood (District CEO); Mary Nielsen (District CFO); Lauren Schafer (Patient Care Director); Craig Halls (County Attorney); County Commissioner Bill Redd(also a board member); Roger Atcitty (Board Member) ; Commissioner Mark Maryboy (Also a board member); John Lewis; Commissioner J. Tyron Lewis (board member); Karen Adams(board member); Patsy Shumway (board member), and other John and Jane Does, as yet unnamed in their personal and official capabilities. These defendants were named as jointly and severally

liable. Roger Atcitty and Mark Maryboy are enrolled members of the Navajo Nation and live within the Navajo Nation boundaries. All other defendants are not enrolled members of the Navajo Nation and live outside the Navajo Nation boundaries.

San Juan County ("county") is a political corporation and subdivision of the State of Utah headquartered in Monticello, Utah, with borders overlapping the Aneth extension under Utah Code Title 17.

The San Juan Health Services District ("District") is a public corporation, political special services district subdivision of the State of Utah, located in Monticello, Utah with borders identical to the County. Utah Code Annotated 17A-2-1301 et seq. Neither of these two entities are subcontractors of the State. They exist on generated revenues and taxes of the local taxpayers, and are required by Utah law to be covered by Insurance policies, surety bonds, and have never been represented by the U. S. Attorneys office or State Attorney General's office in this action. The State fisc is not at risk in this action. The District was a sub-contractor service provider contracted independently with Indian Health Services. This IHS Contract obligated the District to adhere to Tribal Preference in Employment Act provisions and respect Tribal customs. On January 14, 2002, the County Attorney Jesse Trentadue stated that the District was like an 'arm of the County', not an 'arm of the state', and that the County controlled the District by making policy, financing, and appointments, etc.

The defendants filed counterclaims in Navajo Court, paying the required $25 for a filing fee, of fraud against Mrs. Singer that were found to be false. Filing such claims required the payment of $25 to the Tribal

Court in accordance with the Tribal Court local rules. The Navajo Court was obligated to listen to their claims by Navajo 7 NTC 253 and Federal law 25 USC 1301 and 1302, wherein all laws within the Navajo Nation are applied equally to those injured within its borders.

Location of Montezuma Creek Clinic- place of injury

The Navajo Nation boundaries encompass portions of Utah, Colorado, Arizona, and New Mexico.

1. Montezuma Creek is a Navajo Chapter within the Aneth or Utah Strip of the Navajo Nation.
2. The Aneth extension of the Navajo Nation was added to the Navajo Nation in 1933, in exchange for land taken for Lake Powell.
3. Under this Act, "37 1/2 per centum of the net royalties accruing therefrom [minerals and oil] derived from tribal leases shall be paid to the State of Utah: Provided, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein." 47 Stat. 1418.
4. Congress enacted a statute in 1968 that directed the State to expend the 37 1/2% of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." 82 Stat. 121.
5. United States v. Jim, 409 U.S. 80 (1972) declared these laws constitutional.
6. Montezuma Creek Clinic rests on trust lands held by the State of Utah in the Utah Navajo Trust Fund, for the beneficiary Utah strip or Aneth Extension Navajo people.

7. The San Juan Health Services District leased the property from the Utah Navajo Trust Fund (UNTF) for a nominal sum.
8. San Juan County and San Juan Health Services District were acting independently of any management of their activities by UNTF.
9. The property is located within the exterior borders of the Navajo Nation and did business with thousands of Navajo patients a year.
10. The property falls within 'Indian Country' as defined in 18 USC 1151.

Montezuma Creek Clinic operates from a building leased from the Utah Navajo Trust Fund, "UNTF", within "the territorial jurisdiction of the Navajo Nation." [pg. 1. Findings, opinion, and judgement at preliminary injunction].

The Tenth Circuit Court found, that even off-reservation trust land is defined as 'Indian Country". HRI, Inc. v. Enviromental Protection Agency, 198 F. 3d 1224 (10th Cir. 2000). If the property is set aside for use of Indians or is subject to Federal supervision (as with this IHS contract), the area can qualify as "Indian Country." Id.

Location of the Navajo Nation Shiprock District Court-Place of Injury

The Navajo Nation District Court Division of Shiprock, lies within the exterior borders of New Mexico, is organized by Navajo legislative authority as found in federal statutes 25 U.S.C. §§461-479 pursuant to federal authority found in Article I of the United States Constitution for communicating and working with Indian tribes.

Navajo Rights Violations

"If the Navajo Preference in Employment Act has been violated, it is presumptive that the Native

American employee's rights have been violated and Navajo Nation public policy has been undermined and disregarded for naught." Id. and pg. 13.

Also, however, the Court found that the plaintiffs, unlike non-Indians, have "a privilege and duty under Navajo custom and tradition for Mrs. Singer in her tribal-in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizens"....."peculiar to Navajo tradition and law". Pg. 11 Findings, opinion, and judgement at preliminary injunction. In so doing, the Court found that the public health and safety of the Navajo people was endangered by the District. Pg. 12. Findings, opinion, and judgement at preliminary injunction.

The defendants were also found to be "stopping emergency and routine ambulance and EMT service; stopping laboratory services; and billing ..IHS patients creating the chilling result of effectively turning many patients, including diabetic patients, away from Montezuma Creek Clinic for their fear of their inability to pay for their care." pg. 2 Findings, opinion, and judgement at preliminary injunction.

In the Navajo Court room, the Navajo Court found that the had been "repeated misrepresentations of fact and law; spoilation of evidence; witness intimidation and tampering; obstructing testimony; sandbagging of evidence; and repeated and substantive violations of the Navajo Nation Rules of Civil Procedure." Pg. 15 Findings, opinion, and judgement at preliminary injunction. "If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have easily been simply replaced with the Preliminary Injunction on May 14, 1999, with no further

deprivations to the plaintiffs of rights, time, money, embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease. " pg. 18 Findings, opinion, and judgement at preliminary injunction.

The Court also found that the defendants "failed to show how a minor political subdivision of a State can benefit itself an[d] the taxpayers of the district by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and [IHS] contract obligations, all with impunity, and believe that the district is somehow now immune from claims injury; ....." pg. 19 Findings, opinion, and judgment at preliminary injunction.

San Juan County Commissioner Mark Maryboy testified that "San Juan County has a deliberate pattern of not treating Navajo people equally, violating the rights of Navajo and other Native American employees, retaliation and discrimination against Navajo and other Native Americans that has continued for generations." pg. 14. Findings, opinion, and judgement at preliminary injunction.

The Navajo Court noted that if the "injunction does not issue, people will consider the charges and actions against the plaintiffs to be true....There will be a chilling effect upon the rights of all Navajo citizens in the work place if they do not believe that there can be redress against their employers for rights violations in the workplace.... The harm has been irreparable. " pg. 14 Findings, opinion, and judgement at preliminary

injunction.

Due Process for the Defendants

The Court found that the defendants were "not denied due process of law and were provided with every opportunity to be heard as required by Navajo common law; by Navajo statutory law; by Navajo Rules of Civil Procedure; by applicable US law; by the Navajo Nation Bill of Rights, and by the 1968 Indian Civil Rights Act.

The defendants submitted; two 'Answers'; filed, responded to and argued motions; called witnesses; and even by the defendants own accord they invoked the jurisdiction of this Court on its own initiative by seeking the Court's authority and jurisdiction over its own counterclaims filed in this Court seeking its own independent damages as against the defendant Singer. NO COURT RULINGS PROHIBITED THEM FROM FURTHER PARTICIPATION IN ANY FORM OR FASHION. No Court order denied them the privilege of using a certified Court reporter." pg.2- 3 Order denying Motion to dissolve/Modify Preliminary injunction

The Court also issued an Order in Aid to Satisfaction of Preliminary Injunction. The Court also issued an Order mandating that all defendants be bound by the preliminary injunction based upon evidence that Truck Insurance, Mr. Ickes and Reid Wood, the CEO of the Health District attempted to undermine the Navajo Court's initial TRO via Truck issuing a letter threatening the immediate termination of insurance coverage for the Clinic, which in turn would obligate the State to close the clinic entirely by removing its license. As sanctions for this and the actions prolonging the proceedings, the Court bound Truck and Mr. Ickes as parties in privity and to have

responsibilities for all legal liabilities incurred by the defendants as declared in the December 28, 1999 Preliminary Injunction Order.

Final Judgment has issued

The Navajo Court also found that judicial economy, the Navajo Nation Rules of Civil Procedure, the actions of the Defendants in Court, the lack of any credible evidence put forth by the defendants, even after several warnings they were failing to meet their burden, warranted a final judgment finding as to the merit of the case.

Pg. 8-9 Order denying Motion to Dissolve.

Full Faith and Credit

Based upon the foregoing facts and law, the Plaintiffs now seek to have the orders enforced under principals of full faith and credit, or in the alternative, comity. Plaintiffs assert that these Navajo law violation claims were not brought into Tribal Court to simply harass the defendants, or were they brought in bad faith, as exemplified by the findings of the Navajo Court in the Injunction and Order denying modification.

Recent studies show that patient counts from Shiprock hospital show there are probably about a thousand or more Navajo patients living within the Montezuma Creek Clinic area still not going to Montezuma Creek Clinic for initial visits, that are accounted for. No one knows how many people are going nowhere for medical assistance. Diabetes is four times as high within the Navajo Nation and untreated it can cause kidney, eyesight, and other permanent damage.

Additionally, it appears Indian Health Service

has reached some type of settlement with the Defendants to pay for the Native Americans the District privately billed for services, instead of pursuing claims with Indian Health Services. Discovery must be done in this area.

Defendants' Truck and Dennis Ickes

The Navajo Court found that Truck Insurance and Attorney Ickes "did participate in activities with all other previously named defendants, prior to the issuance of the preliminary injunction order....." pg. 2 Order binding all defendants.

As part of the Court's sanctions powers, the Court named them as defendants for their role in " misrepresentation of case law and facts, intimidation of witnesses, spoilation of evidence; interference with the operations of Montezuma Creek Clinic- upon which the plaintiffs have made a motion for supplemental pleading adding Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance as identified John Does as named defendants; . . . "

Attorney Ickes has complained he had no hearing, yet he did not make this complaint in Navajo Court. He filed an affidavit, never filed in Navajo Court. He asked for no hearing and did not respond to the motion to amend the Complaint. He complains that he did not receive the Plaintiffs' written concluding statement. The statement from both sides was a non-responsive pleading and was mailed to Mr. Ickes by Mr. Battles office.

Mr. Ickes states that he is denied his due process due to poor quality of tapes. Primarily only a small part of one hearing is difficult to understand. The entire rest of the approximate 30 hours of hearings is understandable. Plaintiffs reproduced these hearings

for the Court. They were available to the Defendants also.

Mr. Ickes states a motion for enlargement of time was dated two days after the argument was filed. During this time, Mr. Battles office of the Navajo Nation was preparing the arguments via fax with Ms. Rose. Snow storms, high winds, caused phone and power and equipment failures during this preparation. A motion for an enlargement of time was mailed since Ms. Rose was not sure that Mr. Battles would submit the concluding statement timely due to lack of communications and equipment failures due to power outages. Note the final concluding statement is signed only by Mr. Battles and the enlargement of time is signed only by Ms. Rose (then Mrs. Schildmeyer). Mr. Ickes conceded that at one point when summary judgment was made by the Plaintiffs, Mr. Ickes discovered the motion in his case files. At no time has Mr. Ickes or Truck shown evidence of how the Court limited them in hiring a Navajo Court certified reporter, have hearings, make motions, respond to motions, discover evidence, etc.

Mr. Ickes is a member of the Navajo Nation Bar Association and has paid dues to become an officer of the Navajo Court. Truck Insurance held the insurance Contract on Montezuma Creek Clinic and hired Mr. Ickes under a reservation of rights letter. Truck's agent Ron Fulkerson, working with Attorney Ickes and Defendant Reid Wood, CEO of the District, discussed the initial TRO issued by the Tribal Court. Mr. Fulkerson wrote a letter threatening to immediately withdraw insurance, wherein Reid Wood obtained communications from the State that if insurance was with drawn, the Clinic's license would be revoked, thus stopping medical care for all Native Americans within

the Aneth extension.

The Court properly found "Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance Company, should be bound by the preliminary Injunction...." pg. 2 Order binding all Defendants. This was the sanction for months bad faith litigation.

The Navajo Court relied upon its inherent powers to control its processes for direct contempt citing the Court's jurisdiction as found in " inherent sovereignty, the Navajo Nation code, 25 USC 1301 and 1302, and the Montana and Strate decisions and Clark v. Barnard and College Savings Bank v. Florida Prep Aid Postsecondary Education Expense Board et al, ___ U. S. ____ June 23, 1999" pg. 10 Order Denying Motion to Dissolve the Injunction.

The Court found further that to dissolve the injunction would "continue to place Navajo employees and patients who the defendants interact with at both Montezuma Creek Clinic and at Monument Valley, in harm's way. Navajo common law, is[sic] customs and traditions, mandate the Court protect the people, and this Court shall not hesitate to exercise all its powers to do so. " pg. 11 Order denying Motion to Dissolve the Injunction. When the defendants did not obey the Injunction and subsequent orders, the Plaintiffs sought to have these orders enforced in this District Court.

PRAYER FOR RELIEF

Based upon the foregoing, the facts above and as are contained in the four Navajo Nation Court orders, that are attached hereto and incorporated herein, the Plaintiffs Singer, Riggs and Dickson hereby pray for this United States District Court, within the unique duties of the United States government to protect the Native Americans with whom the

government has entered into treaties, to enforce these four orders based upon proper jurisdiction of the Tribal Court. Plaintiffs ask for attorneys fees and costs for enforcing these Orders and all other relief the Court may find just and fair.

Plaintiffs pray for the Court to grant all relief necessary and proper for Dr. MacArthur, Michele Lyman, Helen Valdez, Mrs. Singer, Fred Riggs, and Al Dickson by way of Injunction, Mandamus, and monetary and treble damages.

So Signed this 5th day of October, 2002

_____

Susan Rose
Attorney for the Plaintiffs.

A true and correct copy of this amended complaint is being hand delivered to the defendants counsel, on this 5th day of October, 2002.

_____

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10/31/2005

Civil No. 2:00-CV-584BSJ

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, MICHELE LYMAN, P.A., and HELEN VALDEZ,

Plaintiffs,

vs.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, REID WOOD, CLEAL BRADFORD, ROGER ATCITTY, JOHN LEWIS, JOHN HOUSEKEEPER, KAREN ADAMS, PATSY SHUMWAY, DR. JAMES REDD, DR. LLOYD VAL JONES, DR. MANFRED NELSON, RICHARD BAILEY, MARILEE BAILEY, ORA LEE BLACK, GARY HOLLADAY, LORI WALLACE, CARLA GRIMSHAW, GLORIA YANITO, and LAURIE SCHAFER,

Defendants;

DONNA SINGER, FRED RIGGS, and ALLISON DICKSON,

Plaintiffs,

vs.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, RICHARD BAILEY, REID WOOD, ROGER ATCITTY, JOHN LEWIS, KAREN ADAMS, PATSY SHUMWAY, and LAUREN SCHAFER,

Defendants.

DECLARATORY JUDGMENT

(28 U.S.C.A. § 2201(a)) & JUDGMENT & ORDER OF DISMISSAL
(Fed. R. Civ. P. 58(a))

Based upon the Memorandum Opinion & Order, fled October 12, 2005 (dkt. no. 837), and the Memorandum Decison & Order, filed June 13, 2005 (dkt. no. 742),

IT IS ORDERED, ADJUDGED AND DECREED that based upon the findings of fact reflected in the Orders of the **Navajo Nation District Court for the District of Shiprock, New Mexico,** in *Donna Singer, et al. vs. San Juan County, et al.*, Case No. SR-CV-162-99CV (Navajo Nation Dist. Ct., fled April 12, 1999), dated December 28, 1999 and March 1, 2000,

(1) The Navajo Nation and the Navajo Nation District Court for the District of Shiprock, New Mexico, had civil regulatory authority and adjudicative subject-matter jurisdiction, respectively, over the San Juan Health Services District with respect to its employment of plaintiffs Fred Riggs **and Allison Dickson, and jurisdiction under** *Navajo Nation Code*, Title 7, § 253(B) of at least some of the employment-related claims pleaded by those plaintiffs, consistent with *Montana v. United States*, 450 U.S. 544 (1981). Non-Navajos and non-tribal entities who enter into employment relationships with Navajo members within the boundaries of the Navajo Nation have "enter[ed] consensual relationships with ... its members" within the meaning of *Montana's* **first exception, and the Navajo courts have subject-matter jurisdiction** of disputes between Navajos and nonmember employers arising out of those relationships. Employer-employee relationships involving tribal members likewise have a "direct effect on the ... the economic security, or health or welfare of the tribe" within the meaning of

Montana's second exception, bringing those relationships within the limited scope of the Navajo Nation's inherent civil authority over non-Indians conducting activities on non-Indian fee lands within the reservation boundaries for that reason as well. In extending the coverage of the Navajo Preference in Employment Act to those relationships, the Navajo Nation exercised its lawful civil regulatory authority, an aspect of the Navajos' long-acknowledged power to "make their own laws and be ruled by them," *Williams v. Lee, 358 U.S. 217, 220 (1959)*, reflecting its inherent sovereignty as recognized and enlarged by treaty and Acts of Congress.

(2) The Navajo court also had subject-matter jurisdiction of plaintiffs Singer, Riggs, and Dickson's employment-related claims against defendant Roger **Atcitty, a Navajo tribal member residing on the Navajo Reservation.** For Riggs and Dickson, their claims against Atcitty reflect a dispute arising among tribal members, **over which tribal court subject-matter jurisdiction is exclusive.** *See Fisher v. District Court of the Sixteenth Jud. Dist., 424 U.S. 382, 386-389 (1976).* The Navajo court also has exclusive subject-matter jurisdiction over plaintiff Singer's claim against Atcitty, at least to the extent that her claim arose within Reservation boundaries. *See Williams v. Lee, 358 U.S. 217, 222-223 (1959).*

(3) Of Riggs and Dickson's claims against their employer, the San Juan Health Services District, those claims **which seek directly to enforce the Navajo Preference in Employment Act,** *Navajo Nation Code,* Title 15, § § *601 et seq. (1995)*, were not properly before the Navajo Nation District Court at the time the **three orders at issue were entered, based** upon the limited preliminary factual findings set forth in that court's

December 28, *1999* and March 1, 2000 Orders. The NPEA assigns the Office of Navajo Labor Relations and the Navajo Nation Labor Commission primary jurisdiction over alleged violations of its requirements. In its December 28, *1999* and March 1, 2000 Orders, the Navajo Nation District Court made no findings invoking any exception to the requirement under Navajo law that plaintiffs must first exhaust their administrative remedies under the NPEA before seeking relief under that law in the Navajo courts. Nor does it appear that plaintiffs had been dismissed by the Navajo Nation Labor Commission, or that they were seeking to enforce any order of the Labor Commission in their Navajo court proceeding. The Navajo court's preliminary findings in its December 28, *1999* and March 1, 2000 **Orders do not establish a basis for exercising its jurisdiction over plaintiffs Riggs and Dickson's** NPEA claims absent findings as to exhaustion of the **prescribed administrative remedies.**

(4) Aside from claims arising directly under the NPEA, the Navajo Nation District Court had subj ect-matter jurisdiction over plaintiffs Riggs and Dickson's employment-related common-law tort claims, particularly Mr. Riggs' defamation claim against the Health District and defendant Wood.

(5) Under controlling Supreme Court precedent, the Navajo Nation District Court did not have **subject-matter jurisdiction over** the claims of plaintiff Donna Singer, a non-Indian non-resident of the Navajo Reservation, against the Health District and the non-Indian individual defendants. *Strate v. A-1 Contractors*, 520 U.S. 438(1997).

(6) The Navajo Nation District Court did not have **subject-matter jurisdiction, based upon the limited**

preliminary factual findings set forth in that court's December 28, 1999 and March 1, 2000 Orders, over San Juan County, San Juan County Commissioners Lewis and Redd, San Juan County Attorney Craig Halls, San Juan County administrator Richard Bailey, or the defendant non-Navajo members of the Health District's governance board (John Lewis, Karen Adams, Patsy Shumway), and defendant Lauren Schafer, under *Navajo Nation Code*, Title 7, § 253(B), consistent with *Montana v. United States*, 450 U.S. 544 (1981).

(7) Adjudication of Riggs and Dickson's claims against the Health District was barred by the District's governmental immunity as defined by the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 *et seq.* (1997 & Supp. 2003) (repealed 2004). The State of Utah has not consented to suit against the State or its subdivisions in Indian tribal courts. The State's limited statutory waiver of governmental immunity extends only to the exclusive remedy available under the Act in its exclusively designated forum, the Utah state district courts. While that limited waiver encompasses contract claims and claims involving injuries resulting from

employee conduct, the Act excepts most intentional tort claims, including defamation, emotional distress, interference with contract, and civil rights violations, from the waiver.

(8) Adjudication in the Navajo Nation District Court of plaintiffs Riggs and Dickson's claims against defendant Atcitty arising from his conduct as a member of the Health District's governing board is barred by the Utah Governmental Immunity Act.

(9) Plaintiff Riggs' defamation claim against defendant Wood was excepted from the effect of the immunity afforded by the Utah Governmental Immunity Act,

based upon the Navajo court's preliminary finding that Wood acted through malice in engaging in conduct upon which that defamation claim is based.

(10) Aside from immunity, subsequent events have rendered moot the preliminary injunctive relief granted by the Navajo court on the behalf of the past, **present and future Navajo patients** of the Montezuma Creek Clinic (none of whom appeared as plaintiffs in the Navajo court proceeding) in December of 1999; the County and Health District **defendants had no participation in, or authority or control over the management and operation** of the Montezuma Creek Clinic from and after January 1, 2000, when Utah Navajo Health Systems assumed responsibility for that facility under its contract with the Navajo Nation. Further enforcement of that **relief, particularly for the benefit of unspecified, unidentified and absent plaintiffs,** as against these defendants more than five years after that date would serve no **practical purpose.**

(11) Much of the injunctive relief granted by the Navajo court in favor of plaintiffs Riggs and Dickson on their own pleaded employment-related claims was also rendered moot by subsequent events, and to that extent, the Navajo court's preliminary injunction is no longer capable of specific enforcement in this forum.

(12) As to the remainder of the relief granted, this court also declines to enforce, either as a matter of either full faith and credit or comity, the preliminary injunctive relief granted on Riggs' tort law claims; the other equitable relief granted to Riggs and Dickson by the Navajo court, viz., back pay, back benefits, etc.; and the Navajo court's preliminary award of "attorney's fees, costs and expenses associated with these proceedings to date" in favor of the plaintiffs-all unliquidated as to amount-because the Navajo court orders are

preliminary and interlocutory orders, not final judgments of that court. *See Restatement (Second) of Conflict of Laws § 107 (1971).*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Dr. Steven MacArthur take nothing, and that the action shall be and hereby is DISMISSED with prejudice as against all of the defendants named herein, except that the court declines to exercise supplemental jurisdiction over his claims for (i) intentional interference with contract, (ii) intentional interference with prospective business relations and (iii) defamation as against defendants Dr. James Redd, Dr. L. Val Jones, Laurie Schafer, Dr. Manfred Nelson, and Cleal Bradford, Julie Bronson and Marilee Bailey, *see* 28 U.S.C.A. § *1367(c) (1993);* those claims are hereby DISMISSED without prejudice;

IT I FURTHER ORDERED that plaintiff Michele Lyman take nothing, and that the action hereby i DISMISSED with prejudices against all of the defendants named herein, except that the court declines to exercise supplemental jurisdiction over her claims (i) intentional interference with contract, (ii) intentional interference with prospective business relations, (iii) defamation, and (iv) intentional infliction of emotional distress as against defendants Dr. James Redd, Dr. L. Va.l Jones, Laurie chafer, Dr. Manfred Nelson, and Cleal Bradford, *see 28 U.S.C.A. § 1367(c) (1993);* those claims are hereby DISMISSED without prejudice; and

IT IS FURTHER ORDERED that plaintiff Helen Valdez take nothing, and the action hereby is DISMISSED with prejudice as against the defendants named herein, and in particular, defendants Lori Wallace and the San Juan Health Services District.

Each party shall bear its own costs. See Fed. R.Civ, P.

54(d)(1).

DATED this 31 day of October, 2005.

12/15/2005

Civil No. 2:00-CV-584BSJ

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, MICHELE LYMAN, P.A., and HELEN VALDEZ,

Plaintiffs,

vs.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, REID WOOD, CLEAL BRADFORD, ROGER ATCITTY, JOHN LEWIS, JOHN HOUSEKEEPER, KAREN ADAMS, PATSY SHUMWAY, DR. JAMES REDD, DR. LLOYD VAL JONES, DR. MANFRED NELSON, RICHARD BAILEY, MARILEE BAILEY, ORA LEE BLACK, GARY HOLLADAY, LORI WALLACE, CARLA GRIMSHAW, GLORIA YANITO, and LAURIE SCHAFER,

Defendants;

DONNA SINGER, FRED RIGGS, and ALLISON DICKSON,

Plaintiffs,

vs.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, RICHARD BAILEY, REID WOOD, ROGER ATCITTY, JOHN LEWIS, KAREN ADAMS, PATSY SHUMWAY, and LAUREN SCHAFER,

Defendants.

DECLARATORY JUDGMENT

(28 U.S.C.A. § 2201(a))

Based upon the Memorandum Opinion & Order, filed October 12, 2005 (dkt. no. 837), *MacArthur v. San Juan County*, 391 F. Supp. 2d 895 (D. Utah 2005),

IT IS ORDERED, ADJUDGED AND DECREED that adjudication in the Navajo Nation District Court of plaintiff Donna Singer's claims against defendant Roger Atcitty arising from his conduct as a member of the Health District's governing board is barred by the Utah Governmental Immunity Act, Utah Code Ann. §§ G3-30-1 *et seq.* (1997 & Supp. 2003) (repealed 2004).

AGREEMENT BETWEEN THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR AND THE NAVAJO NATION

A. Authority and Purpose

1. Authority

This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) and by the authority of the Navajo Nation (referred to in this agreement as the "Contractor"). The provisions of Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et. seq.) are incorporated in this agreement

2. Purpose

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et. seq.) **and each provision of this Contract shall be liberally construed for the benefit of the Contractor** to transfer the funding and the following related functions, services, activities and programs (or portions thereof), that are otherwise contractible under Section 102 (a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: **Judicial Program**.

B. Terms, Provisions and Conditions

1. Term

Pursuant to Section 105(c) (I) of the Indian Self-Determination and Education Assistance

Act (25 U.S.C. 450j (c) (1), the term of this contract shall be three years. Pursuant to Section 105:d) (1) of such Act (25 U.S.C. 450j (d), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (F) (2).

2. Effective Date

This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

3. Program Standards

The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (A) (2) of the Contract in conformity with the following standards: in accordance with Navajo Nation Law and the Indian Civil Rights Act.

4. Funding Amount

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (F) (2). Such amount shall not be less than the applicable amount determined pursuant to Section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

5. Limitation of Costs

The Contractor shall not be obligated to continue

(i) be in writing;

(ii) identify the interested

parties, the authorities of such parties,
and purpose of the Contract;

(iii) State the work to be performed under the Contract; and

(iv) State the process for making any claim, the payments to be
made, and the terms of the Contract, which shall be fixed.

C. Obligation of the Contractor

1. Contract Performance

Except as provided in subsection (D) (2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (F) (2) of this Contract.

2. Amount of Funds

The total amount of funds to be paid under this Contract pursuant to Section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

3. Contracted Programs

Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions, and activities identified in this Contract and funded through the annual funding agreements under subsection (F) (2).

4. Trust Services for Individual Indians

A. In general - To the extent that the annual funding agreement provides funding for the delivery of trust services

to individual Indians that have been provided by the Secretary, the Contractor shall maintain at least the same level of service as the Secretary pro-vided for such individual Indians, subject to the availability of appropriated funds for such services.

B. Trust Services to Individual Indians - For the purposes of this paragraph only, the term "trust services for individual Indians" means only those services that pertain to land or financial management connected to individually held allotments.

5. **Fair and Uniform Services**

The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

D. Obligation of the United States

1. Trust Responsibility

A. In general - The United States reaffirms **the trust responsibility of the United States to the Navajo Nation to protect and conserve the trust resources of the Navajo Nation and the trust resources of <u>individual</u> Indians.**

B. Construction of Contract - Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith

in upholding such trust responsibility.

2. Good Faith

To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 160:, et seq.).

3. Programs Retained

As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in the annual funding agreement under subsection (F) (2).

E. Other Provisions

1. Designated Officials

Not later than the effective date of this Contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the Contract, and other purposes for this Contract.

2. Contract Modifications or Amendment

A. In general - Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

B. Exception - The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (F) (2), and

the reduction of funds pursuant to Section 106 (b) (2), shall not be subject to subparagraph (A).

3. Officials Not to Benefit

No Member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this Contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this Contract if such contract is made with a corporation for the general benefit of the corporation.

4. Covenant Against Contingent Fees

The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

F. Attachments

1. Approval of Contract

Unless previously furnished to the Secretary, the resolution of the Intergovernmental Relations Committee of the Navajo Nation Council authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as Attachment 1.

2. Annual Funding Agreement

A. In general - The annual funding agreement under this Contract shall only contain:

(i) terms that identify the programs, services, functions, and activities to be performed or

administered, the general budget category as assigned, the funds to be provided, and the time and method of payment; and

(ii) such other provision, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agreed.

B. Incorporation by Reference - The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as Attachment 2.

/s/_____

/s/_____

Albert Hale, President for

James S. Harjo, 1420 1162 0288

THE NAVAJO NATION

Secretary, Department of the Interior

UNITED STATES OF AMERICA

AFFIDAVIT OF DONNA SINGER OF DISOBEDIENCE
OF NAVAJO COURT ORDERS AND CURRENT ONGOING DAMAGES

Now Comes, Donna Singer, affiant, to state the following is true, under penalty of perjury, upon her best belief and information, as follows:

Background Information

1 Affiant was the manager of Montezuma Creek Clinic (MCC) from about 1995 though December, 1998 under the management of San Juan Health Care Services District and then again in January, 2000 under the management of Utah Navajo Health System through the present.

2. Affiant is married to one of the United States outstanding scholars in the Navajo written language, Lewis Singer, an enrolled Navajo Nation member, who attended Navajo boarding schools and is presently a high school principal within the Navajo Nation.

Familiarity With I.H.S. Regulations:

3. Affiant is thoroughly familiar with Indian Health Service (IHS) Contracts and with the culture and some traditions of the Navajo people in the Montezuma Creek Clinic (MCC) IHS service area.

4. MCC is a 'frontier' medical delivery area. Any other medical care is between 40 and 100 miles away on dangerous roads, where roll overs resulting in high mortality rates are common. Geography and economics require that MCC patients come to MCC for quickest relief for medical problems to protect the patients.

MCC Patients

5. Affiant understands that MCC has about 6000-7000 patients with approximately 60% having some form of

insurance, but all Native Americans having access to IHS provision of healthcare either at an 1113 facility or through contracted health care. These patients are covered by IHS and do not need to pay for services provided at MCC and should not receive bills for such care as per federal regulations included in the IHS contracts.

6. Affiant has been told that the Navajo Court defendants have finally worked out any non-payment of IHS services with a financial settlement of an unknown amount with IHS, at some time within the past year.

7. In the meantime, since January, 2000, the clinic has been operated by Utah Navajo Health Systems (UNHS) a private, non-profit organization.

8. The Navajo Nation has designated Utah Navajo Health System as a tribal organization for the purpose of establishing a PL93-6 38 Self-Determination contract for the provision of healthcare The Navajo Nation does not immediately manage, operate or control UNHS, though
UNHS must abide by Navajo laws.

The County and District Knew of the Damages To Native American Patients and Did Nothing

9. Affiant understood fully that in November of 1999 the diabetic program supervisor, Nettie Prack had reported to the Navajo Court that there was a 250% drop in diabetic visits alone as a result of the Navajo Court defendants sending bills to the patients of the Montezuma Creek Clinic. **The attorneys for the defendants, Mr. Ickes and Mr. Moeller were present in Navajo Court when the information was presented, and understood the damage to the Native American people that these bills were causing. Both**

were familiar with the geography and economics of the area.

10. Affiant is aware that the District's own public records discussed at public District board meetings, during 1999's billings, showed dramatic Native American patient level drops at Montezuma Creek Clinic and Monument Valley Clinic.

11. MCC has (1) sent out mailers and brochures, (2) spoken to chapters and Navajo officials, (3)sent out home visit persons, all in an effort, to try to educated all the diabetic patients and identify any of her patients who stopped using MCC because they had to pay for services due to the Navajo Court defendants billing practices and notify them that they can use these facilities for medical care without being billed and sent to collections.

12. **Despite MCC' s best efforts, dozens of diabetic patients are still not coming to MCC.**

13. **Also, there has been a substantial increase in persons dying and/or needing dialysis at this time, approximately 50 or so patients.**

14. Due to lack of phones, lack of good roads, people: living 20 to 30 miles apart in some areas, and a cultural issue concerning talking about people who have died, it is nearly impossible to determine exactly how many people died as a result of not being seen for care either locally or not at all.

15 **Affiant knows that by Navajo customs deaths within the Chapters are not always reported to the chapter or MCC.**

16. It is nearly impossible to track all patients with other 'silent killer' type diseases such as high blood pressure, anemia, cancer, who are not being screened, examined regularly, or receiving medications due to not coming into MCC or anywhere else for fear they will

have to pay because of the hundreds of bills sent to the Native American populations by San Juan Health District from 1999 to approximately 2001.

17. Affiant understands that the Navajo population is vulnerable to threats of bill collection due a long-standing stigma which interferes with Indian eligibility for credit and (l) a high level of unfamiliarity with the English language; (2) lack of education, (3) lack of good roads to facilitate travel. economic and social intercourse and medical treatment; (4) lack of phones, (5) lack of electricity to get phones, and (6) the inability of home visit personnel to get to some places to educate patients due to the disastrous conditions of the innumerable dirt roads.

18. Affiant believes that, ultimately, (1) only radio ads in Navajo language by the defendants, as government organizations that billed these people, and (2) newspaper ads by the defendants, and (3) letters to customers they billed for whom they have address lists; and (4) verbally discussing the issues with Native American patients in their own language on radio and televisions letting them know that they can be seen at MCC without billings, will convince nearly all the people who were coming to the clinic in 1998, to return to the clinic for health care. This is what Affiant understands
the Navajo Court ordered the defendants to do.

19. Affiant reasons that getting a letter that does not resemble a bill from the Defendant government organizations, who sent the bills, Will be far more effective, than getting a similar letter from UNHS as statistics demonstrate.

Collateral Damages That Last for Years

20. Affiant also understands that for some of the Native American patients, the bills have ruined any chance they have for obtaining inexpensive housing in the Utah strip, due to destroying their credit, the only requirement for obtaining one of these low income housing loans, and that only by restoring the credit rating of these injured individuals by contacting and correcting the credit reports damaged by court collection and collection agency actions for bills which should have been sent to the Indian Health Services for payments will public confidence be restored in receiving health care at MCC.

Navajo Distrust is Strongly Rooted in Past History

21. **Affiant suggests that for anyone to understand why Navajo people wish to live isolated and away from cities and towns and their distrust of San Juan County and Health District governance and white people in general, one only need to look at (1) being forced to abandon their culture and language with very real corporal punishment in boarding schools away from home, by white people; (2) sexual abuse in those boarding schools either perpetrated or tolerated by white people; (3) sterilization of the women for a period of time by white doctors; (4) the horrendous historical long walk that was suffered and is still remembered by today's generations of Navajo; (5) and the lack of any local schools up until 1980's due to white people not spending any school moneys on the reservations for schools; (6) and lack**

of representation on juries in the County, even for Navajo and the prosecutions, until after 1993; (7) and the reported lack of interpreters in court rooms and lack of due process within the courtroom where billing judgments were processed; (8) lack of attention to chapter resolutions by the County; and (10) lack of caring about the effect of the actions of the health district and county on access to health care for the diabetic patients and other Native American patients with chronic diseases, illnesses or acute injuries that absolutely require constant care;(11) use of Indians as a means of receiving federal and state funding for projects which were then used to benefit the white man rather than the Indian.

22. Affiant reasons that as long as MCC is associated in some patients minds with the white man's government, some Native American patients will risk travel on dangerous roads to go as much as 100 miles in any direction to get to a known Indian facility. If the patients cannot afford the gas, Affiants' experience informs her that they often put off getting health care until a crises situation develops. Affiant also knows that if there is not gas money, the patient may hitchhike even in winter weather. Affiant observes it is not uncommon to see people traveling for health care to the clinic on the back of pick up trucks in the dead of winter.

Ongoing Damages

23. Affiant is a patient and employee of MCC and is aware that the other Petitioners Riggs and Dickson are likewise patients and employees of MCC.

24. Undoubtedly, the lack of obedience to the Navajo Court orders, is still interfering with Affiant's ability to manage MCC to provide health care for all

Indian patients who should be served by this facility.

25. Affiant is also still suffering from the very public false accusations of fraud, theft, etc. made by the Defendants, even in supreme court documents, wherein they fail to tell the court these accusations were found to be false and unsupported by even so much as one single piece of any evidence of dishonesty.

26. **Affiant's resources have been and are currently very severally depleted as a result of this ongoing litigation and Affiant was told by County Administrator, Rick Bailey, in about December 1998, that he was not worried about her claims, because there was a case of a worker suing the county that had gone on 15 years and they could just wait until he gave up.**

27. Affiant is aware that her Counsels' resources are also limited, unlike the insurance and government funded law firms for the Navajo defendants.

New Commissioners and Current Negligence In Resolving the Situation

28. Affiant is aware that the new commissioners have received these orders by certified mail and were aware of the suit when they took office.

29. Affiant has been informed directly that the new Commissioners taking office in January 1, 2003, have signed no consents for the current law firm of Suitter and Axeland to represent them or the County and as of at least March 16, 2003, had not even spoken to them or met them.

30. Affiant has observed that the current Commissioners, knowing of the mounting fines for not carrying out the Navajo orders, are doing nothing to carry out the orders, have read copies of the orders.

31. Affiant understands that the current commissioners would only need to hire a new attorney, and have that attorney meet with her attorneys to begin to work these problems out, but no action on the part of the new Commissioners has been taken to do so, even though the fines do not distinguish between the original officials and the current officials, as long as they disobey these court orders.

32. Affiant believes it is also in the best interest of the County taxpayers to stop the fines by obeying the Court orders at the earliest possible opportunity.

33. **Affiant approves of and will move the Navajo Court for an order to place all the fines from the County into a fund for a dialysis center/hospice center within the Utah strip of the Navajo Nation to assist patients harmed by the defendants.**

34. Affiant understands that there are means of structuring settlements wherein the people can obtain payment with greatly diminished harm to the defendants.

35. Affiant now believes requesting cooperation with these defendants will not get action, and only an order for the defendants to carry out the Navajo orders will obtain their IMMEDIATE cooperation.

36. Affiant also believes any attempt by the new Navajo Court defendant Health District board members to get the Orders carried out will be futile as two new members are in the voting minority, and a third new member, is an employee of the County and will generally support the wrongdoing officials.

37. **Affiant is aware that the Federal Court, prior to reading the Navajo orders on remand, indicated that essentially the Court would dismiss them so the entire case could go back up on appeal, and has demanded documents to essentially retry the case,**

not appearing to give the Navajo Court any credibility whatsoever, and appearing to the Affiant to be less than impartial in regards to enforcing the Navajo Court orders.

Further, this Affiant sayeth naught.

Donna Singer

NOTARY CERTIFICATE

County of Coconino

State of Arizona

I, notary public, on this day of April, 24 2003, did witness Donna Singer, appearing before me with a photo I.D., raise her right hand and swear that the foregoing was true upon her best belief and knowledge, and she did sign the foregoing document in my presence.

So signed this 24 day of April, 2003

Notary Public

My commission expires on the 14th day of Sept., 2003

Notary Public

STATE OF ARIZONA

Coconino County

r (202)393-4141EW 154a

JENNIFER M. HAGAR

My Commission Expires 09/14/2003

ANETH CHAPTER
Aneth, (Navajo Nation) Utah

RESOLUTION OF THE
ANETH CHAPTER
ANETH (NAVAJO NATION), UTAH
REQUESTING SAN JUAN HEALTH CARE
SERVICES TO IMMEDIATELY REINSTATE
FRED RIGGS, P.A.C. AS MEDICAL PROVIDER &
DONNA SINGER AS MANAGER AT THE
HEALTH CENTER & TO DISCLOSE
FINANCIAL INFORMATION INCLUDING
PROFITS GENERATED AT MONTEZUMA
CREEK HEALTH CENTER: THE PERCENTAGE
UTILIZED TO SUPPORT COUNTY-WIDE
OPERATIONS TO ASSIST THE COMMUNITY IN
CONVERTING THE MONTEZUMA CREEK
HEALTH CENTER INTO A COMMUNITY
CLINIC OPERATED BY A COMMUNITY BASED
501(c)(3) NON-PROFIT CORPORATION.

WHEREAS:

1. The Aneth Chapter is certified and recognized as a governmental entity of the Navajo Nation given the authority to act on behalf of its community to recommend, support and approve all community related issues and concerns for the benefit of local residents; and

2. The San Juan Health Care Services pursued and assumed control of the Montezuma Cteek Health Center in 1995 per Indian Health Service Contract *24590004 to provide vital medical care services to the residents of Aneth, Montezuma Creek, Red Mesa and Mexican Water; and

3. By lease arrangement and for a nominal sum of $1.00 per year, the Utah Navajo Trust Fund have provided an operable facility for medial care operations in Montezuma Creek and additionally a start-up loan of $350,000 was authorized on February 22, 1994 to be repaid timely with Montezuma Creek Health Center profits; and

4. The San Juan Health Care Services is currently experiencing financial difficulties resulting in part from experimentation with various medical management groups, ill-advised managerial decisions/staffing and continued operation of money-losing medical centers at the expense of profit-making facilities (e.g., Montezuma Creek Health Center); and

5. The Montezuma Creek Health Center has unfortunately been made a part of the problem, initially by lack of attention, next by diversion of revenue from Montezuma Creek Health Center to less-profitable county facilities, **followed by attempts to shift the IHS billing system from Montezuma Creek to the Monticello Hospital to save northern jobs and finally intimidation (including termination) of employees for speaking out for the needs of the Montezuma Creek Clinic; and**

6. San Juan Health Care Services' abrupt dismissal of experienced and dedicated employees (i.e., including the only Navajo-speaking provider) is insensitive and disrespectful of the special medical needs confronting the Navajo People; furthermore these actions are detrimental when stability was finally re established at the Montezuma Creek Health Center.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Aneth Chapter hereby request the immediate reinstatement of Fred Riggs, P.A.C. as Medical Provider & Donna Singer as Manager of the

Montezuma Creek Health Center and that San Juan Health Care Services **immediately curtail intimidation of clinic employees who advocate for local needs & interest**

2. The Aneth Chapter hereby request San Juan Health Care Services to disclose all financial information pertaining to the Montezuma Creek Health Center including yearly audits, identification of cost factors, actual expenditures, revenues generated at Montezuma Creek Health Center, amount of profits diverted to county-wide operations & compliance with IHS contract stipulations.

3. The Aneth Chapter hereby request San Juan Health Services (without interruption in current delivery of medical services) to provide technical assistance in converting the Montezuma Creek Health Center into a Community Clinic with management by a 501(c)(3) nonprofit

thereby offering the following advantages (A) reinvestment of profits into local operations, (B) greater reimbursement; from medicaid/medicare, (C) greater accessibility to private monies through status as nonprofit and (D) assurance of community involvement.

CERTIFICATION

We, hereby certify that the foregoing resolution was duly considered by the Aneth (Navajo Nation) Chapter, Utah at a duly called meeting at which a quorum was present and the same was passed by a vote of 26 in favor, 00 opposed and 00 abstained, this 6th day of December, 1998.

Robert Whitehorse, Council Delegate

ANETH CHAPTER

Leonard Lee, President

ANETH CHAPTER

Nelson Rockwell, Vice-President
ANETH CHAPTER
Tina Lansing, Secretary/Treasurer
ANETH CHAPTER

RED MESA CHAPTER
Red Mesa, Navajo Nation, Utah

RESOLUTION

RED MESA (NAVAJO NATION), UTAH REQUESTING SAN JUAN HEALTH CARE SERVICES TO IMMEDIATELY REINSTATE FRED RIGGS, P.A.C. AS MEDICAL PROVIDER & DONNA SINGER DISCLOSE FINANCIAL INFORMATION INCLUDING PROFITS GENERATED AT MONTEZUMA CREEK HEALTH CENTER: THE PERCENTAGE UTILIZED TO SUPPORT COUNTY-WIDE OPERATION & TO ASSIST THE COMMUNITY IN CONVERTING CLINIC OPERATED BY A COMMUNITY BASED 501(c)(3) NONPROFIT CORPORATION.

WHEREAS:

1. The Aneth and Red Mesa Chapter is certified and recognized as a governmental entity of the Navajo Nation given the authority to act on behalf of it community to recommend, support and approve all community related issues and concerns for the benefit of local residents; and

2. The San Juan Health Care Services pursued and assumed control of the Montezuma Creek Health Center in 1995 per Indian Health Service Contract # 24590004 to provide vital medical care services to the residents of Aneth, Montezuma Creek, Red Mesa and Mexican Water; and

3. By lease arrangement and for a nominal sum of $1.00 per year, the Utah Navajo Trust Fund have provided an operable facility for medical care operations in Montezuma Creek and additionally a startup loan of $350,00 was authorized on February 22, 1994 to be

repaid timely with Montezuma Creek Health Center profits; and

4. The San Juan Health Care Services is currently experiencing financial difficulties resulting in part from experimentation with various medical management groups, ill-advised managerial decisions/staffing and continued operation of money-losing medical centers at the expense of profit-making facilities (e.g., Montezuma Creek Health Center); and

5. The Montezuma Creek Health Center has unfortunately been made a part of the problem, initially by lack of attention, next by diversion of revenue from Montezuma Creek Health Center to less-profitable county facilities, followed by attempts to shift the IHS billing system from Montezuma Creek to the Monticello Hospital to save northern jobs and finally intimidation (including termination) of employees for speaking out for the needs of the Montezuma Creek Clinic; and

6. San Juan Health Care Services' abrupt dismissal of experienced and dedicated employees (i.e., including the only Navajo-speaking provider) is insensitive and disrespectful of the special medical needs confronting the Navajo People; furthermore these actions are detrimental when stability was finally re established at the Montezuma Creek Health Center.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Aneth Chapter hereby request the immediate reinstatement of Fred Riggs, P.A.C. as Medical Provider & Donna Singer as Manager of the Montezuma Creek Health Center and that San Juan Health Care Services immediately curtail intimidation of clinic employees who advocate for local needs & interest

2. The Aneth Chapter hereby request San Juan Health Care Services to disclose all financial information pertaining to the Montezuma Creek Health Center including yearly audits, identification of cost factors, actual expenditures, revenues generated at Montezuma Creek Health Center, amount of profits diverted to county-wide operations & compliance with IHS contract stipulations.

3. **The Aneth Chapter hereby request San Juan Health Services (without interruption in current delivery of medical services) to provide technical assistance in converting the Montezuma Creek Health Center into a Community Clinic with management by a 501(c)(3) nonprofit thereby offering the following advantages (A) reinvestment of profits into local operations, (B) greater reimbursement; from medicaid/medicare, (C) greater accessibility to private monies through status as nonprofit and (D) assurance of community involvement.**

CERTIFICATION

We, hereby certify that the foregoing resolution was duly considered by the Aneth (Navajo Nation) Chapter, Utah at a duly called meeting at which a quorum was present and the same was passed by a vote of 26 in favor, 00 opposed and 00 abstained, this 6th day of December, 1998.

r (202)393-4141EW 240a
David L. John, Council Delegate
Louis Tapana, Sr., Chapter President
Harrison Nakai, Sr., Vice-President
Edward Tapana, Secretary/Treasurer

Summary
Utah Navajo Health Care Survey

May 8th, 2003
Prepared by
Jane Shelby PhD

Background:

My background includes a doctorate from the University of Utah in Sociology, with focus in Medical Sociology. I am a tenured Associate Professor of Surgery and Adjunct Associate Professor of Sociology at the University of Utah. My career focus has been research, I have published over 100 peer reviewed articles in medical related research, and have graduate level training in statistics, including analysis of survey questions and answers. For several years I have directed a volunteer effort of licensed medical professionals to provide health screening clinics for hypertension, glasses, diabetes, and other diseases in Utah Navajoland, and thus am familiar with the health needs, and culture of the people of this area.

Survey Methods:

The survey was designed, printed and sent to 1,000 households in the eastern portion of the Utah strip of the Navajo reservation, San Juan County, Utah, by Fred Riggs and others in late April, 2003. The survey was completely anonymous with no identifying information of the respondents. Attached to the survey was a stamped envelope addressed to Dr. Jane Shelby who had agreed to receive the surveys, and perform a data summary and analysis of the responses.

The surveys received by Dr. Shelby were numbered, and the responses entered into a Microsoft Excel database. As of May 8, 2003 a total of 238 surveys had been received and recorded. These results

presumably come from the English speaking population in the Utah strip of the reservation.

Survey Results:

Question 1. Does San Juan Health District run Montezuma Creek Clink now?

Respondents: 234 22.6% (53) respondents answered yes to this question, 20.5% (48) answered no, and a majority 56.8% (133) did not know if San Juan Health District was the organizational authority currently of the Montezuma Creek Clinic.

Question 2. Did the patient bills from San Juan Health District during 1999 and 2000 make you not want to go to Montezuma Creek Clink for health care?

Respondents: 230 35.7% (82) respondents answered yes to this question, 63% (145) answered no and 1 .3% (3) said they did not know.

Question 3. Do you go to Montezuma Creek Clinic for health care now?

Respondents: 228 The majority of the respondents answered yes to this question, 81.1% (185), while 18.9% (43) said no.

Question 4. Do you go to Monument Valley Clinic for health care now?

Respondents: 220 The majority of the respondents answered no to this question, 93.6% (206), while 5.9% (13) answered yes, and one respondent said they didn't know.

Question 5. Where do you go for regular medical care?
Respondents: 214 The majority of respondents use Montezuma Creek Clinic services for health care, with Shiprock Medical Center listed as the second most frequented facility.

Question 6. Do you believe you have to pay for services at Montezuma Creek Clinic now?
Respondents: 234 20.9% (49) of respondents answered yes to this question, while 77.4% (181) responded no, and 1.7% (4) said they didn't know.

Question 7. Do you believe you have to pay for services at Monument Valley Clink now?
Respondents: 202 The majority of respondents answered no to this question 8 1.7% (165), while 11.4% (23) answered yes, and 6.9% (14) said they didn't know.

Question 8. Do you know of anyone currently not going to Montezuma Creek Clinic or Monument Valley Clinic for health care because they are afraid they have to pay when they go or are afraid they will get billed?
Respondents: 234 Almost a third of the respondents answered yes to this question, 30.3% (71), while 68.4% (160) said no, and 3 (1.3%) replied that they didn't know.

Question 9. What Chapter (referring to Question 8)
Respondents:57 Aneth and Red Mesa Chapters were the most frequently listed Chapter Houses, and Mexican Water was also listed several times.

Question 10. **Since January 1, 1999, do you know of anyone anxious about patient bills or who thought they had to pay for care at the clinics, who did not**

go to the clinics for care and later died or became more seriously ill?
Respondents:227 Of the 227 respondents, 17.2% (39) answered yes to this question, 81.1% (184) answered no and 4 (1.8%) said they did not know.
Question 11. How many? (referring to Question 10)
Respondents: 25 Responses ranged between 1 and 1 00, with most under 10.
Question 12. What Chapter? (referring to Question 10)
Respondents:30 Red Mesa and Aneth Chapter Houses were mentioned most frequently.
Question 13. What Chapter did this death occur? (referring to Question 10)
Respondents: 21 Red Mesa and Aneth Chapter Houses were mentioned most frequently, with locations of hospitals where the deaths presumably occurred also listed.

Question 14. Are there other people in this chapter still not going to the clinics for care because they think they will receive bills to pay if they go to these clinics?
Respondents:89 Of the 89 respondents, 56.2% (50) indicated yes to this question, while 32.6% (29) said no, and 10 said they didn't know.
Question 15. How many, >20? (referring to Question 14)
Respondents:41 Answers ranged between 1 and 2,000, with 46.3% saying the number was greater than 20.
Question 16. Is there anyone you know of who is not being seen anywhere for medical care due to having no money to pay for care?
Respondents:227 27.8% (63) respondents answered yes to this question, 68.7% (156) said no, and 8 (3.5%) replied they didn't know.
Question 17. About how many? (referring to Question 16)
Respondents:48 Responses ranged between 1 and 1 ,000, with most answers ranging between 1 and 10.
Question 18. What Chapter? (referring to Question 16)
Respondents:46 Red Mesa and Aneth Chapter Houses were mentioned most frequently.
Question 19. Have you received a bad credit rating or been denied credit because of patient billings from San Juan Health Care Services?
Respondents:202 21.8% (44) of respondents answered yes to this question, 77.7% (157) said no, and 1 replied that they didn't know.

Results Discussion:

The response to this survey were varied, and appeared to be an accurate portrayal of the thoughts and experiences of people living in Utah Navajoland. The answers to this survey was not contrived, they were anonymous and the answers were not uniform in any

respect that I could readily discern. **There appears to be a significant number of people in Utah Navajoland (80% of respondents) who do not know that San Juan Health District does not operate the Montezuma Creek Clinic.** The majority of respondents to this survey currently use the services of this clinic (81.1%), although over a third of the respondents reported that patient bills from the San Juan Health District made them not want to go to the Montezuma Creek Clinic during 1999 and 2000, and 21% still believe you have to pay for services at this clinic. **It is concerning that 30.3% of respondents reported knowing someone who was not going to the Montezuma Creek Clinic for fear of having to pay or of the possibility of receiving bills for service.** This lingering belief and fear of being billed thus places these people in the position of having to travel longer distances for access to health care, if they have the money and means to travel farther than Montezuma Creek Clinic. **Thirty nine respondents to this survey also reported knowledge of serious health consequences of people whose avoidance of clinics was related to the fear of billing by San Juan Health District. Further, a continuing legacy was revealed by 50 respondents reporting knowledge of people who currently are not getting care in the local clinics due to fear of billing.**

The vulnerability of this population in accessing health care is apparent by the report by **63 respondents who said that they know of people who are not being seen anywhere due to having no money to pay for care.**

Economic harm from San Juan Health Care Services billing appears to have affected 44 of the respondents in this survey, due to bad or denied credit situations.

Out of 1,000 surveys sent to Utah Navajoland households, almost 25% were returned with responses.

This is a good response for such a survey effort, however one may conclude that the majority of respondents are of households with at least one English speaking adult. **Households where the Navajo language is predominant or exclusive may not be represented in the responses summarized in this report, and the concern would be that it is the people in these households that are most vulnerable regarding their health status and access to health care.** Thus, the apparent ongoing negative impact of large numbers of people who are avoiding seeking health care in the local clinics due to fearful impressions of potential for billing and lack of money may be understated by the results of this survey. The worst cases may not have been captured by this survey, and more effort to quantify and identify people in critical need of health care is warranted.

From the screening clinics that my group has conducted in the Four Corners area of the Navajo Nation since 1999 I have become aware of the myriad of serious barriers to health information and care that the residents of this area face on a historic and current basis. Lack of phones, living from 35 to a hundred miles from health care facilities, lack of even gravel roads in many cases, lack of transportation or gas, lack of indoor plumbing and electricity, a high percentage of non English speaking people are all barriers that make this population particularly vulnerable to more severe consequences of disease, and if they believe they have to pay for care, they are burdened even further.

This population faces challenges in daily living due to poverty and isolation that are far beyond those

of most people in the United States, with the highest rates of
death in America for several categories of disease and accidental causes. During our screening health clinics held twice yearly for the past 3 years, we would diagnosed 6- 10 potential new cases of diabetes, and similar numbers of high blood pressure during two days of clinics with approximately 300-500 visitors total in just two days. The clinic visitors expressed gratitude for the clinics and availability of health information and advise, telling us that access to health care was difficult.

This vulnerable population faces many challenges in terms of access to health care at all stages of life, and the results of this survey indicate that they may continue
to pay the price for any additional barriers to health care with increased severity of illness and premature deaths.

CONCLUSION

The survey responses by a large percentage of respondents indicate there were there detrimental health consequences to people due to the billing practices of San Juan Health District during the 1 1999-2000 time period. If the percentages of the respondents are continued through the general population, the survey demonstrates that this legacy appears to continue today with many people, realistically possibly hundreds if not over a thousand, not receiving any health care due to residual fears of economic harm and lack of resources, both monetary and informational. The foregoing information, is true to the best of my information and belief. So Signed this 9th day of May, 2003

Dr. Jane Shelby, Ph. D.

Notary Certification

County of Salt Lake State of Utah
I, (notary public) did witness Dr. Jane
Shelby, appearing before me with a picture
Identification, swear to me that the foregoing is true to
the best of her belief and knowledge, and signed the
foregoing document in my presence.
(Notary Public)
My Commission expires 1-1-05 day of 9th, 2003
Notary Public
Shaleen W. Watkins
615 Arapeen Dr., Ste 110
Salt Lake City, Utah 84108
My Commission Expires
January 1, 2005

Nos. 05-4295 & 05-4310
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN MACARTHUR; NATHANIEL PENN; MICHELLE LYMAN; HELEN VALDEZ; CANDACE LAWS; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; CANDACE HOLIDAY, NICOLE ROBERTS,

Plaintiffs,

and

ALISON DICKSON; DONNA SINGER; FRED RIGGS,

Plaintiffs - Appellants/Cross-

Appellees,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; JAMES

D. REDD; L. VAL JONES; MANFRED R. NELSON; RICHARD BAILEY; MARILEE BAILEY; ORA LEE BLACK;

GARY HOLLADAY; LORI WALLACE, also known as Laurie Walker; ST. PAUL'S INSURANCE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; R. DENNIS ICKES; LAURIE SCHAFER; LYN STEVENS, San Juan County Commissioner; MANUEL MORGAN, San Juan County Commissioner; NETTIE PRACK; GLEN IMEL,

Defendants - Appellees/Cross-Appellants.

ORDER
Filed August 14, 2007

Before KELLY, EBEL, and McCONNELL, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court

who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Please note the citation correction of the opinion entered on July 18, 2007. Page 23, line 7, see Hicks, U.S. at 358-65 should be modified to read see Atkinson Trading

Co., 532 U.S. at 654-57. Please make the change to your copy of the opinion.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by:
Deputy Clerk